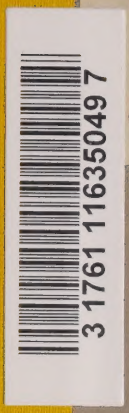

HOUSE OF COMMONS

CANADA

THIRD REPORT

of the

SPECIAL COMMITTEE

on

STATUTORY INSTRUMENTS

MARK MacGUIGAN

Chairman

SESSION 1968-69

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20892—1

QUEEN'S PRINTER FOR CANADA
OTTAWA, 1969

The Special Committee

on

Statutory Instruments

has the honour

to present its

THIRD REPORT

SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS

Chairman: Mr. Mark MacGuigan

Vice-Chairman: Mr. Gilles Marceau

and Messrs.

Baldwin,	Hogarth,	Murphy,
Brewin,	McCleave,	Stafford,
Forest,	Muir (*Cape Breton-The Sydneys*),	Tétrault—(12).
Gibson,		

Edouard Thomas,
Clerk of the Committee.

TABLE OF CONTENTS

20892—2

CORRECTIONS

Page 1 — Line number 12, *insert*: Mr. McIntosh was replaced by Mr. McCleave on April 21st 1969.

Page 2 — 3rd paragraph from top: *add the name of* Professor J. E. Kersell

Page 36 — Line 4 from top: *delete* it has
insert 17 of these have

Page 40 — Line 36 from top: *delete*

(j) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations.

It is obvious that the establishment of such tribunals is of such importance that it should be provided for by statute.

Page 41 — Line 15 from top: *insert* (Emphasis has been added to quotations listed in section (i)).

Page 42 — After 2nd paragraph *insert new paragraph*

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It is obvious that the establishment of such tribunals is of such importance that it should be provided for by statute.

Page 53 — Line 21 from top: *insert* (Emphasis added).

Page 91 — Line 18: section (j): *delete* (page 40).
insert (page 42).

PREFACE

This Report is based on the assumption that public knowledge of governmental activities is the basis of all control of delegated legislation. For parliamentary democracy is a system of government which requires that the executive be responsible to the legislature and that both be accountable to the people, and there can be neither responsibility nor accountability where there is no knowledge of what has been done. In political matters knowledge is the beginning of power, and its lack, impotence.

There are many forms of executive and administrative secrecy. The practice of secrecy relates to such varied matters as the availability of government documents to scholars, the production of official documents in litigation, security screening of individuals and classification of documents, and general access to information about government programs and operations. Your Committee can agree with the view of Dr. D. C. Rowat that the general tradition of administrative secrecy "is based on an earlier system of royal rule in Britain that is unsuited to a modern democracy in which the people must be fully informed about the activities of their government" ("How Much Administrative Secrecy?" (1965) *Canadian Journal of Economics and Political Science,* vol. 31, p. 479 at p. 480). But other bodies have been and are conducting studies of many of these matters, and your Committee wishes to confine itself solely to the area of delegated legislation. Your Committee's contention is, therefore, that there should be, as a general rule, public knowledge of the processes of delegated legislation before, during, and after the making of regulations, and that any derogation by government from this rule requires justification.

Your Committee adopts this position for five reasons. First, the people cannot control their government without knowledge of its actions, nor can Parliament fulfil its role of responsibility with respect to legislation without being fully informed on the operation of those legislative powers which it has delegated to others. Second, the existence of secrecy is likely to lead to popular suspicion of wrongdoing by government whether or not there is any genuine reason for suspicion. Third, we are living today in a period

20892—2½

in which the validity of authority can no longer be taken for granted but must be constantly demonstrated. Governmental systems which do not take this new attitude seriously are apt to find public confidence in them diminishing rapidly. Obviously a continuing demonstration of the justice of the system necessitates an opening of the processes and products of delegated legislation to the light of publicity. Fourth, your Committee has been able to find no reason, either theoretical or practical, except the force of tradition, why there should not be publicity in the making of regulations. Canadian governments appear to have remarkably little to hide, and therefore nothing to lose, from openness except their psychological investment in existing practices. Indeed, publicity can have the positive value for administrators of helping them to improve weaknesses in their system. Fifth, since regulations have the force of laws, they should be made by processes which as far as possible approximate the openness of the general legislative process.

Just as publicity has a curative value inasmuch as it contains the possibility of exposure of error and stupidity through criticism, so your Committee believes the act of publicizing parliamentary criticism of specific regulations, or of governmental practices in delegated legislation, performs an important service even in the absence of sanctions. Undoubtedly, Bernard Crick goes too far in taking the position that parliamentary control of the executive must mean *"influence,* not direct power; *advice,* not command; *criticism,* not obstruction, *scrutiny,* not initiation, and *publicity,* not secrecy" (*The Reform of Parliament* (1964), p. 77), for parliament must retain ultimate direct control of the executive or lose its status altogether. But your Committee has nevertheless concluded that parliamentary control over delegated legislation should not be such as to automatically threaten the life of the government over every controverted regulation but, rather, such as to keep the government responsive to the views of members of parliament and to the feelings of the public. In short, your Committee has chosen to stress the principle of the responsibility of the executive to parliament for delegated legislation as well as for the enactment of statutes.

Your Committee's proposals to implement the principle of "open government" will urge full consultation with the public and with parliamentary standing committees *before* the making of regulations, the extension of the ambit of the present internal scrutiny of regulations by the Privy Council Office and the Department of Justice *during* the making of regulations, and full publication of regulations *after* they have been made, as well as your Committee's principal institutional recommendation, the establishment of a new Standing Committee on Regulations to provide an initial subsequent scrutiny, followed by the referral of appropriate regulations to the other Standing Committees for further consideration. It is your Committee's intention that the meetings and reports of this new Committee would be public.

In addition, your Committee proposes the establishment of guidelines for the enabling legislation which originally confers on the executive the right to make delegated legislation.

Your Committee's proposals for the fuller implementation of responsible

government will recommend the assumption of complete responsibility for independent bodies which have the power to make regulations and, especially the duty of the government to justify to parliament any departures from the ordinary rules of good regulation-making.

Your Committee believes that in calling for a renewed dedication to the principles of open and responsible government it is not proposing a fundamental change in the character of our system of parliamentary democracy but is rather attempting to actualize potentialities of our present system which can no longer be allowed to remain latent. In sum, your Committee is proposing a much needed reform, not the abandonment of our form of government. It is your Committee's hope that its recommendations will contribute a new dimension to our system of law-making.

Chapter 1

Introduction

1. *Terms of Reference and Program*

The Special Committee on Statutory Instruments was appointed by order of the House of Commons on September 30, 1968, with the following order of reference:

> *Resolved,*—That a Special Committee of twelve Members, to be named at a later date, be appointed to consider and, from time to time, to report on procedures for the review by this House of instruments made in virtue of any statute of the Parliament of Canada.

On November 8, 1968, the House further ordered:

> That the Special Committee on Statutory Instruments appointed on September 30, 1968, be composed of the following Members: Messrs. Baldwin, Brewin, Forest, Gibson, Hogarth, MacGuigan, Marceau, ~~McIntosh,~~ Muir (*Cape Breton-The Sydneys*), Murphy, Stafford and Tétrault.

At the first Committee meeting on November 13, 1968, Dr. Mark MacGuigan and Mr. Gilles Marceau were elected chairman and vice-chairman respectively.

On July 10, 1969, the House made the following additional order:

> That the powers of the Special Committee on Statutory Instruments, appointed by order of the House on September 30, 1968, be extended by adding the following powers:
>
> > To consider and, from time to time, to report on the adequacy of existing statutory authority for the making and publication of Statutory Instruments and on the adequacy of existing procedures for the drafting, scrutiny, and operational review of such instruments, and to make recommendations with respect thereto.

The enlargement of the order of reference by the House of Commons recognizes that an assessment of the processes for reviewing delegated legislation cannot be conducted apart from a consideration of the statutory provisions authorizing them, a point of view with which your Committee fully concurs.

Dr. Gilles Pépin, then Dean of the Civil Law Section at the University of Ottawa, and Mr. John W. Morden, barrister-at-law of Toronto, were appointed Counsel and Assistant Counsel respectively on February 13, 1969

(effective on February 17, 1969, with the adoption by the House of the Committee's Second Report). Your Committee has also had the services of Dr. Henriette Immarigeon of the Research Branch of the Parliamentary Library. Your Committee wishes to express its great indebtedness to Dr. Pépin, Mr. Morden, and Dr. Immarigeon for their faithful and perceptive service.

Your Committee's investigations and research have taken four main forms: the examination of witnesses at Committee hearings; the canvassing of the information and viewpoints of all government departments and agencies by means of a questionnaire (*See Minutes of Proceedings and Evidence,* pp. 46-47); a consolidation of the voluminous literature which exists on the subject of delegated legislation; and the preparation of a survey of the enabling clauses in all the statutes of Canada.

With respect to your Committee's hearings we are grateful to those who gave evidence before us. They are: Professor H. W. Arthurs; Professor C. L. Brown-John; Professor J. R. Mallory; Professor A. S. Abel; Mr. G. S. Rutherford; Mr. C. B. Koester; Professor D. J. Baum; and officials from the Department of Transport, the Department of Manpower and Immigration, the Privy Council Office and the Department of Justice, in addition to Hon. Donald S. Macdonald, the President of the Privy Council, and Hon. John Turner, the Minister of Justice, Professor J. E. [illegible]

Within the purview of your Committee's particular inquiry, many able scholars and others interested in the subject of delegated legislation have written extensively, profoundly and usefully on the very problems with which we are concerned. Your Committee frankly acknowledges that it has heavily drawn upon their work in the preparation of its Report.

Your Committee has, as it intended to do, canvassed the experience of many other countries, especially Commonwealth countries, in the course of its studies, but it has not found it advisable to set out this learning in its Report except where it appeared to be relevant in a particular context.

Despite the presence of the phrase "statutory instruments" in its name, your Committee has preferred throughout to use the more ordinary term "regulations", to describe our subject matter. Your Committee gives "regulation" the general meaning of any exercise of legislative power under the authority of a statute, and defines it more exactly in Chapter 2.

2. *The Necessity of Delegated Legislation*

The federal Administration—a modern synonym for the word "Executive"—is composed of numerous authorities having varying degrees of independence from Parliament: the Governor in Council, Ministers, Crown Corporations, various Boards and Commissions often called "administrative tribunals" and public officers who are sometimes designated by statutes ("persona designata") to perform particular acts. One of the principal activities of the Administration is law-making. First of all, the administrative authorities and their staffs play an important role in the preparation of the statutes enacted by Parliament itself, since that vast majority of legislative

proposals originate in the Administration. However, it is also now commonplace for the Administration to make laws directly, without having to observe the complex but safeguarding rules of parliamentary procedure, for Parliament frequently delegates to it its own legislative power, i.e., the power to enact general rules of conduct, which confer legally enforceable rights on citizens and impose legally enforceable obligations on them.

Hence, section 22 (3) of the *Customs Act*, R.S.C., 1952, ch. 58, as amended bestows regulation-making authority on the Governor in Council:

> The Governor in Council may make regulations prescribing
> (*a*) the terms and conditions upon which goods may be entered into Canada free of any requirement that the importer shall, at the time of entry, pay or cause to be so paid all duties on the goods so entered inwards; and
> (*b*) the terms and conditions of any bond, note or other document presented upon the entry of such goods in respect of the duties thereon.

The National Library Act, R.S.C. 1952, ch. 330, on the other hand, gives regulation-making power to the Minister (the Secretary of State) in section 11(4):

> The Minister may make regulations
> (*a*) respecting the quality of the copies required to be delivered to the National Librarian of any book the copies of which are not of uniform quality;
> (*b*) prescribing generally the classes or kinds of books in respect of which only one copy is required to be delivered to the National Librarian; and
> (*c*) prescribing the classes or kinds of books in respect of which no copies are required to be delivered to the National Librarian unless specially requested by him.

The *Broadcasting Act*, S.C. 1967-68, ch. 25, section 16(1), gives to the Canadian Radio Television Commission, a body independent of the Ministry in its operation, power to:

> (*a*) prescribe classes of broadcasting licenses;
> (*b*) make regulations applicable to all persons holding broadcasting licenses, or to all persons holding broadcasting licenses of one or more classes
> (i) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph (*d*) of section 2 (varied and comprehensive programming, balanced opportunity for the expression of differing views on matter of public concern, high standards, etc.),
> (ii) respecting the character of advertising and the amount of time that may be devoted to advertising,
> (iii) respecting the proportion of time that may be devoted to the broadcasting of programs, advertisements or announcements of a partisan political character and the assignment of such time on equitable basis to political parties and candidates, . . .
> (vi) prescribing the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs,
> (vii) with the approval of the Treasury Board, fixing the schedules of fees to be paid by licensees and providing for the payment thereof,
> (viii) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify, and,
> (ix) respecting such other matters as it deems necessary for the furtherance of its objects . . .

The Parliament of Canada has the authority to delegate its legislative powers to the federal administrative authorities (*Hodge v. The Queen,* (1883-84) 9 A.C. 117; *Liquidators of Maritime Bank of Canada v. Receiver General of New Brunswick* [1892] A.C. 437), but it cannot delegate them to the provincial Legislatures (*Attorney-General of Nova Scotia v. Attorney-General of Canada.* [1951] S.C.R. 31), although this principle does not preclude delegation by Parliament to a provincial administrative authority, e.g. a provincially appointed and controlled board (*P.E.I. Potato Marketing Board v. Willis* [1952] 2 S.C.R. 392; *Coughlin v. Ontario Highway Transport Board,* (1968) 68 D.L.R. (2d) 384).

Parliament can delegate its legislative powers. It cannot abdicate them (*Re Gray,* (1918) 57 S.C.R. 150), but the distinction between abdication and delegation seems to have no practical meaning, as long as Parliament can revoke at any time the specific power granted and can nullify anything done under it. As a judge has pointed out,

> A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not to be considered. (Anglin J., in *Re Gray,* (1918) 57 S.C.R. 150, at p. 176).

But as for delegation, there is no difficulty:

> If then both the law which gives delegated power, and the volition, are those of the legislature, is not the question of abdication a political one for the electorate rather than a constitutional one for the courts? (B. Laskin, *Canadian Constitutional Law,* (3rd ed., 1968) p. 45).

Four hundred and twenty of the 601 Acts of Parliament examined by the Committee (constituting substantially all of the statutes now in force) provide for delegated legislation. Moreover, a substantial majority of the answers given to question No. 2 of the Committee's questionnaire stated that statutory powers to make regulations have been used very extensively. The following statistics confirm this impression: 6,892 regulations covering 19,972 pages were published in the *Canada Gazette* during the period from January 1, 1956, to December 31, 1968, an average of 530 regulations a year. This does not take into account those regulations which are expressly exempted from publication and also some documents which are perhaps in fact of a legislative nature but are not officially considered to be so by the regulation-making authority.

The reasons usually given to justify the delegation by Parliament of the power to make laws are: lack of parliamentary time; lack of parliamentary knowledge on technical matters; the necessity of rapid decisions in cases of emergency; the need to experiment with legislation, especially in a new field; the need for flexibility in the application of laws; and unforeseen contingencies which may arise during the introduction of new and complex pieces of legislation. It also seems that the force of precedent has some bearing on it; sections conferring powers of delegated legislation now tend to be considered as standard clauses by the draftsmen of statutes.

Uneasiness respecting the extent of delegated legislation began to be evident in England toward the end of the nineteenth century, just at the

time that it began to be a frequently used device. The concern multiplied in proportion with its growth. Hence, delegated legislation formed one of the matters referred to the United Kingdom Committee on Ministers' Powers, whose report was published in 1932 (Cmd. 4060); it was also of some concern to the American Committee on Administrative Procedure, whose report was published in 1941. Since that time, although it has continued to grow in bulk and importance, in Britain, in Canada, in the United States and elsewhere, it has not been a subject of such controversy. In the United States, the practice has been accepted by the Courts, although the U.S. Constitution prescribes explicitly that "All legislative powers herein granted shall be vested in a Congress" (Article 1). The contemporary consensus was probably put by Mr. A. Beuvan, before the British Select Committee on Delegated Legislation, in 1953: "There is now general agreement about the necessity for delegated legislation; the real problem is how this legislation can be reconciled with the processes of democratic consultation, scrutiny and control".

The same situation seems to prevail today in the United States, despite the constitutional provision just noticed. "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard" said the United States Supreme Court in 1935; the enabling legislation, in other words, must contain a framework within which the administrative action is to be confined. But according to Professor Schwartz,

> It cannot be denied . . . that the attitude of the American Court toward the delegation problem has changed substantially . . . But, if standards such as those contained in the Renegotiation and Communications Acts (to do what is in the public interest or necessary) are upheld as adequate, it becomes apparent that the requirement of standards has become more a matter of form than substance. Provided that there is no abdication of the Congressional function . . . the enabling law will be upheld, even though the only standard which the Court can find is so broad as to be almost illusory. (*An Introduction to American Administrative Law* (2nd ed. 1962), p. 42).

Today, therefore, critics of regulation-making do not seek to deny its necessity in some form; their complaints have been aimed rather against the volume and character of delegated legislation than against the practice itself. (*Report of the Committee on Ministers' Powers,* 1932, p. 53). The more fundamental of the criticisms can be summarized as follows: the parliamentary tendency to enact statutes in skeleton form, leaving the "details" to be filled in by regulations—such regulations being often the very matters that are of most importance to the citizen; uncertainty in enabling statutes as to the extent of the area regulations are intended to cover; sweeping or subjective terms used in enabling acts which exclude the judicial control of the regulations made under their authority; lack of public debate, and inadequate consultation of all interested parties before the making of the regulations; lack of precision in the form and content of the regulations; inadequate publicity given to the regulations after they are made; inadequate parliamentary control over the regulations; and the danger that civil servants may be transformed into our masters.

Each of these criticisms is important, but they do not destroy the case for delegated legislation. They were put in proper perspective by the Donoughmore Committee:

> Their true bearing is rather that there are dangers in the practice; that it is liable to abuse; and that safeguards are required . . . The problem which the critics raise is essentially one of devising the best safeguards. (*Report of the Committee on Ministers' Powers,* 1932, p. 54).

This is also the approach espoused by Louis L. Jaffe's *Judicial Control of Administrative Action* (1965) at pages 85-86:

> A positive approach to the dangers of delegation is to develop the many devices for safeguarding and improving its operations. We have already discussed some of them: the legislative settlement of the guiding principle particularly of legitimately disputed questions of policy; legislative scrutiny of administrative action with a view to revision; rule making with an insistence on a precision which cannot obtain in the basic legislation. Beyond these lies the whole field of procedure which at the same time is the condition of the power being fulfilled and the safeguard of its legitimate exercise.

Your Committee does not accept an abstract analysis of the principle of the separation of powers which would regard regulation-making as a proper function of the legislative branch of government, grudgingly bestowed on the executive because of the human deficiencies of legislators. We believe rather that there is, properly as well as practically, an executive function of subordinate law-making. But we also believe that, because it is a delegated power, the delegator, Parliament, has a continuing responsibility to ensure its well-functioning in the public interest.

It is in this spirit that your Committee has examined the functioning of the Canadian system of delegated legislation and proposes the correction of certain malfunctions.

Such correction, on a continuing basis, necessitates an after-the-fact control, and we therefore agree with Griffith and Street on the importance of controls:

> The real argument is not whether the Executive, for example, is exercising legislative or judicial powers which properly belong to Parliament or the courts (for no kind of power belongs to any particular authority) but whether the power is being exercised by the authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action. (*Principles of Administrative Law,* (2nd ed., 1963) p. 16).

Your Committee believes that the controls it recommends will provide the safeguards necessary to limit the executive power of law-making without interfering unduly with its exercise.

Chapter 2

The Making of Regulations

1. *The Legal Requirements*

Parliament adopted the *Regulations Act* in 1950 (S.C. 1950, ch. 50, now R.S.C. 1952, ch. 235), without too much debate; its main purpose was to provide a system of publication for regulations. This can be seen from its official title: "An Act to provide for the Publication of Statutory Regulations", and from a statement made at the time by Prime Minister St. Laurent:

> The main purpose of the bill is to ensure that all orders, regulations and proclamations, made or issued in the exercise of legislative powers delegated by parliament, are published and tabled in a systematic and uniform manner. There is no provision here for enlarging the powers to make orders or regulations. It is merely to deal with the exercise of powers already existing under prior legislation. It is to provide that there be one uniform system of tabling and publishing these orders. Such publication and tabling is to be compulsory .... We feel that the time has now come when we can bring to parliament something that should be practical and workable, and which may not have to be varied too frequently or too soon. This does provide unequivocally for the compulsory publication and tabling of all instruments made under the delegated legislative powers; that is the sole purpose of this measure. Although largely based on the statutory orders and regulations order, 1947, this bill will further clarify and extend the procedure, in order to ensure that it covers the whole field of delegated legislation. (*Debates of the House of Commons,* 1950, p. 3039-3040).

The problem of publication will be dealt with later in this report, but there is more in the *Regulations Act,* and in the regulations that were adopted under its authority ("*Regulations made under Section 9* of the *Regulations Act,* P.C. 1954-1787"), than the matter of publication. Much in the way of the actual statutory safeguards turns on whether a regulation is "caught" by the provisions of the *Regulations Act*. If a regulation is so caught, it is submitted to the following prescriptions:

(1) According to the requirements of the *Regulations made under the Regulations Act,* section 4:

> Two copies of each proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards.

(2) According to the *Canadian Bill of Rights,* S.C. 1960, ch. 44, s. 3:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

And the *Bill of Rights Examination Regulations,* sections 4-7, SOR/61-16:

> 4. A copy of every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act shall before the making of the proposed regulations, be transmitted to the Deputy Minister of Justice by the Clerk of the Privy Council.
>
> 5. Forthwith upon receipt of a copy of a proposed regulation transmitted by the Clerk of the Privy Council . . . the Minister [of Justice] shall
>
> (*a*) examine the proposed Regulation in order to determine whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Bill of Rights; and
>
> (*b*) cause to be affixed to the copy thereof so transmitted by the Clerk of the Privy Council a certificate, in a form approved by the Minister and signed by the Deputy Minister of Justice, stating that the proposed Regulation has been examined as required by the Canadian Bill of Rights;
>
> and the copy so certified shall thereupon be transmitted to the Clerk of the Privy Council.
>
> 6. Where any of the provisions . . . of any proposed regulation examined [by the Minister] are ascertained by the Minister to be inconsistent with the purposes and provisions of the Canadian Bill of Rights, the Minister shall make a report in writing of the inconsistency and shall cause such report to be deposited with the Clerk of the House of Commons in accordance with Standing Order 40 of the House of Commons at the earliest convenient opportunity.
>
> 7. A copy of every report made by the Minister . . . shall, where such report relates to a proposed regulation, be transmitted to the Clerk of the Privy Council forthwith upon the making thereof.

(3) According to section 3(1) of the *Regulations Act*:

> Every regulation-making authority shall, within seven days after it makes a regulation, transmit copies of the regulation in English and in French to the Clerk of the Privy Council.

(4) According to section 3(2) of the *Regulations Act* and to section 5 of the *Regulations made under the Regulations Act*:

> A copy of a regulation transmitted to the Clerk of the Privy Council . . . other than one made by the Governor in Council or the Treasury Board, shall be certified by the regulation-making authority to be a true copy of the regulation.
>
> Three copies in English and one in French of every regulation, one copy of which shall be certified, shall be transmitted to the Clerk of the Privy Council, in accordance with section 3 of the Act.

(5) According to section 4 of the *Regulations Act*:

> The Clerk of the Privy Council shall maintain a record in which he shall record the regulations transmitted to him . . . [and] every regulation recorded under this section shall bear a number assigned to it by the Clerk of the Privy Council . . . .

(6) According to section 6(1) of the *Regulations Act*:

> Every regulation shall be published in English and in French in the Canada Gazette within thirty days after it is made.

(7) According to section 7 of the *Regulations Act*:

> Every regulation shall be laid before Parliament within fifteen days after it is published in the Canada Gazette or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

If a regulation is not a "regulation" as defined in the *Regulations Act,* then it is not, at least by virtue of this Act, subject to any of these processes. The reach of the Act is thus established by the definition of "regulation" set forth in section 2 thereof, and by the power given to the Governor in Council, in section 9(2), to exempt regulations from the operation of the principal provisions of the *Regulations Act,* and in the result, from the scrutiny provision of the *Canadian Bill of Rights.*

2. *The Legal Status of Regulations*

The regulations made by the Administration are known collectively as delegated or subordinate legislation.

The expression "delegated legislation" indicates that an administrative authority is allowed to make a regulation only when Parliament has delegated to it the power to do so:

> ... every order-in-council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from a subordinate agency derives its legal force solely from ... [an] Act of Parliament. All such instruments derive their authority from the statute which creates the power, and not from the executive body by which they are made. (Duff J., *Chemicals Reference,* [1943] S.C.R. p. 1, at p. 13).

There is only one exception to this principle; the Royal prerogative can also authorize the Governor General to make regulations, although this power is ordinarily used in a non-legislative way. The prerogative was the object of some concern in the House of Commons in 1967 (*Debates,* p. 592-599 and 827-829) and the then Minister of Justice, the Honourable P. E. Trudeau, explained it as follows:

> I was asked to give examples of cases where a regulation, in this general sense, could be made under the authority of the governor in council and not by virtue of a statute. I answered in a general way that there would be many such cases where the governor in council acts by virtue of the royal prerogative, which of course is the most obvious one.
>
> The hon. member asked me for some other examples. I shall give a few today in the hope this will help the discussion. For instance, Mr. Speaker, when an ambassador is appointed under the Great Seal, this is done by the governor in council but not by virtue of any statute. This action is taken under a prerogative which, from time immemorial, has belonged to the king or queen under our form of government and has come down by way of prerogative to the governor in council who exercises the executive power. This is an example of a prerogative where an action is taken without the authority of a specific statute.
>
> Another example is when the governor in council appoints a person as a queen's counsel or indeed confers upon him some other honour. These actions are not taken under the authority of any particular statute. It is a matter of the royal prerogative as it has been understood in this country....
>
> I should like to give another example of action taken or regulations made under the authority of the governor in council but not authorized by statute. I cite the proclamation of a day to be observed, either in part or in totality, as a public holiday. There is no statute of which I know which authorizes the governor in

> council to do that. As an employer the government can do this. The government can decide to issue some rule, regulation, bylaw, whatever it is called in this definition, to the effect that today the employees can go home at three o'clock in the afternoon. This action is not taken under the authority of a statute. . . . (*ibid.*, p. 828).

The only current example of what may be called a legislative use of the prerogative in Canada appears to be P.C. 1954-2029, the Fair Wages Policy, respecting contracts entered into by the Government of Canada. Analogous to this is the proclamation of January 28th, 1965, proclaiming the National Flag of Canada (SOR/65-62). This proclamation, however, followed a resolution by both Houses of Parliament.

Regulations made pursuant to the Crown prerogative are not delegated or subordinate legislation; they are original legislation. It must nevertheless be remembered that Parliament has the sovereign authority to abolish one or all of the prerogative powers (see section 12 of the *B.N.A. Act*) or to merge them into statutes. The Crown prerogative can be a source of legislative power because Parliament accepts, by its silence, this situation. It could perhaps be said that the prerogative legislative powers of the Governor General are actually delegated by Parliament, but in a negative way. In New Zealand prerogative regulations are expressly covered by the *Regulations Act* of 1936, section 2(1)(*c*). Your Committee believes this should also be the case in Canada.

Your Committee therefore recommends that regulations made in the exercise of the prerogative power of the Governor in Council, in so far as they are of a legislative character, should be subject to the same procedures and requirements as other regulations of a legislative character.

The general status of regulations as law is, however, not entirely clear. Everyone agrees that subordinate legislation constitutes law and that regulations have the same force as law. The following recent statement of the Ontario Court of Appeal is an accurate description of the general status of regulations: "These Regulations [made under the *Penitentiary Act*] having been made pursuant to the authority conferred by the Act upon the Governor in Council . . .have the same force as law, as have the provisions of the statute itself." (*Regina v. Institutional Head of Beaver Creek Correctional Camp, ex parte MacCaud,* [1969] 1 O.R 373, p. 380).

But is there a difference between a regulation and a statute? In the *Queen v. Walker,* Lush J. said that "an order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids" ((1875) L.R. 10 Q.B. 355), whereas in *The King v. Singer,* the Supreme Court of Canada decided that for the purpose of the enforcement of the Criminal Code, a regulation was not an Act of Parliament ([1941] S.C.R. 111). In the *Japanese Reference,* a few years later, the Judical Committee of the Privy Council said that the regulations in question were laws made by Parliament: "Legislative activity of Parliament is still present at the time when the orders are made, and these orders are law. In their Lordships' opinion they are laws made by the Parliament at the date of their promulgation." ([1947] A.C. 87, p. 107).

The new *Interpretation Act* (S.C. 1967-1968, ch. 7) provides that an "enactment" means "an Act or a regulation or any portion of an Act or regulation" (section 2(1)(*c*)). Since several later sections in the *Interpretation Act* deal with "enactments", it appears that for many purposes regulations have been put on the same plane as statutes. Reference may be made to section 27(2) which affects the distinction made by the Supreme Court in *The King v. Singer*:

> 27. (2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

Therefore, the appropriate provisions of the *Criminal Code* apply to a prosecution for contravention of a regulation in the same way that they apply to a prosecution for contravention of a statute. If there is no difference between a law and a regulation, if regulations are "laws made by the Parliament at the date of their promulgation", how is it that they are not published like laws, and that a specific clause was adopted to say that a regulation that has been published shall be judicially noticed, etc.? Does section 133 of the *B.N.A. Act,* which provides that the laws of Parliament and of the Quebec Legislature must be published in English and in French, also apply to regulations?

It is true that in a federal state, there is an additional resemblance between regulations and laws; the former is subordinate to the parent act, the latter to the constitution. But Parliament can legislate in virtue of a power that belongs to itself (*Hodge v. The Queen, Liquidators of Maritime Bank v. The Receiver General of New Brunswick*); an administrative authority has a rule making power only when Parliament delegates such a power to that authority and as long as Parliament does not decide to take it back. There is definitely a difference between a statute and a regulation, even if both have the same force.

The same is true even for the regulations made under the authority of the Crown prerogative, because Parliament has the power to abolish the prerogative. To say that "regulations are laws made by the Parliament at the date of their promulgation" is not exact; but the Judicial Committee was politically obliged to make that assertion because the drafters of the Statute of Westminster of 1931 forgot to mention explicitly that, not only laws made by Parliament, but also, and *a fortiori,* regulations and other decisions adopted by administrative authorities could be repugnant to the *Colonial Laws Validity Act* of 1865.

Mention should be made finally of section 26(4) of the *Interpretation Act*:

> Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, amend or vary the regulations and make others.

Thus the power to unmake regulations is a concomitant of the power to make them.

3. *The Present Definition of Regulation*

The validity of regulations generally comes into question in proceedings to enforce them when they are prohibitory, or in proceedings in which an individual claims rights conferred on him by the regulations. It must be remembered that a sovereign Parliament may always adopt a law to repeal or to amend a valid regulation or, and this is in practice more important, to validate an illegal, or what is perhaps an illegal, regulation. (See, for example, *An Act respecting an Order of His Excellency the Governor in Council entitled the Surcharge on Imports Order, S.C. 1963, ch. 18*).

But, what is exactly a regulation; more precisely, what is a *Regulations Act* regulation?

Existing legislation contains varying definitions of "regulation":

> "regulation" means a rule, order, regulation, by-law or proclamation... (*Regulations Act,* section 2(a)).
> "regulation" includes an order, regulation, order in council, order prescribing regulations, rule, rule of court, form, tariff of costs and fees, letters patent, commission, warrant, proclamation, by-law, resolution... (*Interpretation Act,* S.C. 1967-1968, ch. 7, section 2, para. 1(*e*)).

Many of the same synonyms are found in a different context:

> "judgment" when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof... (*Supreme Court Act,* R.S.C. 1952, ch. 259, section 2(*d*)).

It is not too unusual to find in statutory conjunction power to make "orders", "rules" and "regulations", with no indication as to what the difference is. The confusion of names is not only due to the use of many different words for the same thing. It is aggravated by the use of the same word for different things. The word "order" is used for an administrative act, for a judicial act, for a legislative act and for a prerogative act. The name of this Committee is the "Special Committee on Statutory Instruments" and its terms of reference use the expressions "instruments made in virtue of any statute of the Parliament of Canada" and "statutory instruments". There does not appear to be any Canadian statute which uses the expression "statutory instruments". In fact, not all instruments issued under statutory authority can be regarded as regulations. A statute may confer power to make legislative, judicial, quasi-judicial, administrative and ministerial decisions.

"Statutory instruments" is a commonly used term in the United Kingdom where it means, generally, regulations, but only because the *Statutory Instrument Act* of 1946 says so:

> Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown then, if the power is expressed,
> (*a*) in the case of a power conferred on His Majesty, to be exercisable by Order in Council;
> (*b*) in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument,
> any document by which that power is exercised shall be known as a "statutory instrument" and the provisions of this Act shall apply thereto accordingly. (Section 1).

We are of the view that many of the "instructions", "directives", "guide-books", "manuals", etc., issued by departments may be, in essence, regulations, and we shall develop this point further on in this Report.

It has been suggested that the term "regulation" covers legislative statements of general application; "order", a particular direction in a special case; rule, a procedural law; and by-law, a regulation made by a public corporation for its internal management. No doubt the expression "order in council" has become sanctioned by long tradition and presents perhaps a further difficulty by being another term to describe the rule-making activity of the Governor in Council.

In our view, Parliament has not paid enough attention to the importance of clear and consistent terminology. Of course, it must be recognized that it is not always easy to draw a line between what is a legislative matter of general application and a particular direction in a special case. The McRuer Commission found a similar difficulty:

> We have taken pains to demonstrate that there are no precise and mutually exclusive definitions of legislative, judicial and executive powers so as to dispel any idea that any clear distinction could be drawn when solving problems referred to the Commission.
>
> The absence of clear distinctions raises problems of terminology. Probably in no other branch of the law or political science are the difficulties arising from terminology as great. (*Royal Commission—Inquiry Into Civil Rights,* 1968, p. 31).

Delegated legislation is thus known by a variety of expressions and one has to look at the content of a decision to see if it is a regulation:

> The essential nature of a statutory power is to be found by examining the decision its possessor is empowered to make . . . But the important issue is not who does it or in what way, but rather what it is the agency has been authorized to do. (J. A. Corry, "Statutory Powers", in *Legal Essays in Honour of Arthur Moxon,* 127, at p. 133).

The main difficulty in practice is to distinguish between a legislative act (regulation) and an administrative act. The following statements show what is generally involved in the term "legislative" but also how very difficult it is to give it a definitive meaning:

> The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction, or the application of a general rule to a particular case in accordance with the requirements of policy . . . Since the general shades off into the particular, to discriminate between the legislative and the administrative by reference to these criteria may be a peculiarly difficult task, and it is not surprising that the opinions of judges as to the proper characterization of a statutory function are often at variance. If a Minister has power to requisition houses and to delegate his power, and he proceeds to delegate his power to an individual town clerk, there can be no doubt that this delegation is an administrative act; but if he delegates his power to all town clerks, is the instrument of delegation a legislative or an administrative order? Fortunately, decisions in the courts seldom turn on this type of question alone; and when it arises it is apt to be glossed over. (S. A. de Smith, *Judicial Review of Administrative Action,* (2nd ed. 1968), pp. 56-57).
>
> The meaning of 'legislative' and 'executive' may be determined by reference to the nature of the action. By this test, a power to make rules of general application is a legislative power and the rule is a legislative rule. A power to give

orders in specific 'cases' is, by the same test, an executive power and the order is an executive order. Similarly, a power to take specific action is an executive power and the action is an executive action. The difficulty here is that of distinguishing between what is 'general' and what is 'specific'. These words, although they have some extreme and easily recognizable forms do not help to solve the doubtful cases. The matter is finally one for arbitrary decision. There is no answer, save one that is arbitrary, to the old and comparable riddle: 'how many sheep make a flock? (J. A. G. Griffith and H. Street, *Principles of Administrative Law,* (3rd ed., 1963) p. 51).

It is often said that legislative power consists of the authority to lay down general rules for the future. The making of such rules is the main activity of our best known legislative bodies and we tend to take it as the indicium of legislative power. Yet we acknowledge that a private act of Parliament which lacks generality and makes rules for one or a few specific persons or situations is nevertheless legislation. Equally, an ex post facto law is still an exercise of legislative power determining retrospectively the legal effect to be given to actions already completed. (J. A. Corry, "Statutory Powers", in *Legal Essays in Honour of Arthur Moxon,* p. 134-135).

One of the most helpful definitions of rule making is that of Professor Fuchs, who concludes that rule making should be defined as 'the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations'. (K. C. Davis, *Administrative Law Treatise,* (1958) p. 286).

Your Committee believes it would be helpful to use the following description: a regulation is a rule of conduct, enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons; it does not matter if this rule of conduct is called an order, a decree, an ordinance, a rule, or a regulation.

Your Committee must presume that the Parliament was of a similar mind when it stated in the *Regulations Act* that a regulation is "a rule, order, regulation, by-law or proclamation made in the exercise of a legislative power conferred by or under an Act of Parliament" (Section 2(*a*)). The expression "made in the exercise of a legislative power", or a practically similar term, is found in the Regulations Acts of many jurisdictions (Ontario, Manitoba, Alberta, Saskatchewan, British Columbia, United Kingdom—for regulations adopted under the authority of statutes passed before 1947—and Australia). On the other hand, the New Zealand *Regulations Act,* 1936, avoids the problem (and thereby undoubtedly sweeps all sorts of documents within its purview) with the following definition:

2. Interpretation—(1) In this Act the expression "regulations" means and includes—

(*a*) Regulations, rules, or bylaws made under the authority of any Act by the Governor-General in Council or by any Minister of the Crown or by any other authority empowered in that behalf:

(*b*) Orders in Council, Proclamations, notices, Warrants and instruments of authority made under any Act which extend or vary the scope or provisions of any Act;

(*c*) Regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand,—

but does not include regulations made by any local authority or by any authority or persons having jurisdiction limited to any district or locality.

To conclude that a document is the result of the exercise of a legislative power and that it is a regulation, has very important legal consequences. It

must be subjected to the *Regulations Act* procedures unless expressly exempted. Moreover, according to section 8(1) of the *Regulations Act*, a regulation that has been published in the *Canada Gazette* shall be judicially noticed. Further, the common law procedural rules of natural justice do not apply to the exercise of subordinate legislation. Finally, regulations cannot be held invalid for unreasonableness. Hence, important legal consequences flow from a characterization that is sometimes very difficult to make.

Let us now examine the definition adopted by Parliament in its *Regulations Act*:

> 2. In this Act
> (*a*) "regulation" means a rule, order, regulation, by-law or proclamation
> (i) made, in the exercise of a legislative power conferred by or under an Act of Parliament, by the Governor in Council, the Treasury Board, a Minister of the Crown, or a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada or
> (ii) for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament,
> but does not include
> (iii) an ordinance of the Yukon Territory or the Northwest Territories,
> (iv) an order or decision of a judicial tribunal,
> (v) a rule, order or regulation governing the practice or procedure in any proceedings before a judicial tribunal, or
> (vi) a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within subparagraph (ii) ....

For the moment we shall not deal with the problem of exemptions.

A decision is not a regulation, according to the *Regulations Act*, unless it (A) satisfies each and every one of four requirements or, alternatively, (B) satisfies two requirements:

(A) (1). It must be "a rule, order, regulation, by-law or proclamation." (Section 2(*a*)). This can probably be satisfactorily determined if the parent Act, in its express terms, enables a "rule, order, regulation, by-law or proclamation" to be made under it, and the document is expressed to be a "rule, order, regulation, by-law or proclamation".

According to the *Interpretation Act* (S.C. 1967-1968, ch. 7, section 2), the word "regulation" includes the above-mentioned expressions but also:

> form, tariff of costs or fees, letters patent, commission, warrant, resolution or other instrument issued, made or established
> (i) in the execution of a power conferred by or under the authority of an Act, or
> (ii) by or under the authority of the Governor in Council.

Obviously many of these documents, for example, letters patent and commissions respecting the appointment of persons, are not in fact regulations. The definition given by the *Interpretation Act* corresponds to a particular need, as was pointed out by the Minister of Justice (Hon. P. E. Trudeau) in 1967, when this Act was adopted:

> We are discussing here an interpretation act which tends to give general definitions which will be applicable to the greatest possible number of statutes. In due course when we revise the other statutes, when they are before the house, I expect parliament will ... achieve the laudable aim of reaching uniformity of

definition. But of course we cannot do it by way of an interpretation act. All we are doing by way of the Interpretation Act is trying to get as large a definition as possible applicable to the greatest number of acts.

There will always be, for particular statutes, particular definitions. It is not the intention of this bill, nor could it be the will of parliament, I think, to dispense in the future with all interpretive sections which appear at the beginning of each statute and which mean to give particular definitions to particular statutes.

This is a general one. Indeed, I hope that when we look at the various other statutes we will tend toward a general definition but we cannot, I repeat, do it by this Interpretation Act.... If we look at section 2 of the Interpretation Act we see that 'enactment' includes a regulation. Therefore every time the word 'enactment' or 'enact' appears in a section it includes a reference to regulation. In that sense, therefore, although the word 'regulation' does not appear in a great many places, it is really included in the word 'enact' which does appear frequently. That is why it was found useful in clause 2(1)(e) to define the word 'regulation' in a general way which will apply to all sections of this act.

Incidentally, in rereading what I said the other night I noticed that I indicated that since 'regulation' is defined in the bill it would tend to apply to all other statutes. Of course this is not necessarily so. Clause 2(1)(e) gives the definition of 'regulation'. When it appears in other acts it will have the particular meaning ascribed to it in the context or in the definition in that particular act... If such an order is given granting a holiday or part holiday or appionting a Queen's Counsel, it may be useful to know when the order takes effect. The Interpretation Act will permit us to say, if a day is mentioned, that it will begin on that day or, if an hour is mentioned, it will begin at that particular hour. The Interpretation Act will tell us whether it should be understood in terms of standard time or what.

These are a few examples. There are quite a few others which I could give if the discussion is continued. I do not want to prolong this debate. I believe I have given sufficient examples to indicate that the Interpretation Act is not increasing the government's power to issue regulations in the general sense. The intention of this bill is to show what the words mean, how they shall be interpreted in a case where the power does exist. However, Mr. Speaker, if the power does not exist under some statute or under some prerogative, then the Interpretation Act cannot create such power. If the power does exist under an act or under a prerogative, then the Interpretation Act tells us how the words we find in that act or regulation shall be interpreted. (*Debates of the House of Commons,* 1967, pp. 597, 828).

(2) It must be made "in the exercise of a legislative power." As we have already seen, this is the most difficult and crucial test (section 2(*a*) (i)).

(3) Legislative power must be "conferred by or under an Act of Parliament" (section 2(*a*) (ii)). Prerogative regulations are thus excluded. While it may be easy to determine whether or not a power is conferred *by* an Act of Parliament, it may not be so easy with respect to powers conferred *under* an Act of Parliament. Wherein do these differ from those conferred *by* an Act? Could *"under* an Act of Parliament" apply to regulations made pursuant to a *sub-delegated power*? This is difficult to answer. In fact, some sub-delegated legislation has been *numbered* and published apparently under the *Regulations Act.* See, for example, SOR/53-111 passed under a regulation made pursuant to a power conferred by the *Fisheries Act,* 1932. See also all of the regulations made pursuant to what may be considered sub-delegated powers under the *Agricultural Products Marketing Act. In any event, the reach of the Regulations Act to regulations made pursuant to sub-delegated powers ought to be established beyond doubt.*

The necessity of internal scrutiny, filing, publication, laying, etc., apply *a fortiori* to regulations that are adopted by an authority which is not the one designated by the enabling Act.

(4) It must be made "by the Governor in Council, the Treasury Board, a Minister of the Crown, or a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada" (section 2(*a*) (i)). It is clear that the "other body or person" must be an agent or servant of Her Majesty. Does this qualification apply also to "a board, commission (or) corporation"? This point ought to be clarified.

(B) (1) It must be a "rule, order, regulation, by-law or proclamation". As to this, see above.

(1) It must be a rule, order, etc., "for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament". According to paragraph (vi) of section 2(*a*), the word regulation does not include "a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within sub-paragraph (ii)." The following excerpt from the 1950 *House of Commons Debates* (p. 3498) can be usefully referred to here:

> *Mr. Browne* (St. John's West): I should like to ask the Prime Minister if he can make a little bit clearer to me the reason why the conjunction 'or' comes at the end of section 2(*a*) (i) and not 'and'?
> *Mr. St. Laurent:* Because there are orders that we wish to have come under the provisions of this statute which are not made by government agencies such as, for instance, those made by the board of directors of a railway company with respect to the conduct of the passengers on their trains. Suppose they are regulations the infringement of which is punishable by fine or imprisonment under a section of the Railway Act. We want those included. If we used 'and' they would not be included unless they were orders made by the kind of government agency described in one of the subsections.
> *Mr. Browne* (St. John's West): That is what puzzled me. Would you not call a railway company a corporation?
> *Mr. Knowles:* Not the Canadian Pacific Railway.
> *Mr. Browne* (St. John's West): Oh, I understand.
> *Mr. St. Laurent:* It is not a corporation representing the government.
> *Mr. Browne* (St. John's West): Now I understand. Thank you.

Normally regulations sanctioned by a penalty with all the requirements in (A), though Mr. St. Laurent's words when the Act was first passed in 1950 would suggest that they were intended to catch regulations of a merely administrative character which provided for penalties. (*Debates*, 1950, pp. 3039-3040). Section 2(*a*) (ii) would also catch regulations made by persons other than these named in section 2(*a*) (i).

4. *Expressed or Implied Exemptions from the Regulations Act*

When the *Regulations Act* was first passed in 1950, it was said by Prime Minister St. Laurent that its ambit would be "sweeping" and that it was better to allow specific exemptions from its application than to narrow its range:

> It was not possible to make a definition of regulations that would exclude the sort of thing one does not want to have in this [Bill]. For instance, it might be

that an order given to an aeroplane from a control tower would be a regulation. That would be one thing for one occasion. This bill provides that the general rule will be that everything has to be published, but that the governor in council may except certain classes. In order to do so, however, that class or those classes would have to be published and tabled, so that members of parliament will see what is to be excepted. Then they can make such comment as they think justified upon the exception that will be made . . .

With respect to this definition [of regulation] I want to state again that we found it would not be possible or prudent to make statutory exemptions with respect to the application of this statute. We wanted it to include everything to make it necessary for us to call attention to anything that was not going to be governed by it. So we said we would make it as sweeping as possible so it would apply to every kind of order that has legislative effect, made under authority given by parliament; and if we wanted to take anything out of that general, sweeping declaration we would have to call attention to what we were taking out so if there should be any controversy as to whether it should be in or out the matter would be brought to the attention of hon. members and the public. This would apply to a great many things if we did not make exceptions. It would apply, for instance, to all the orders given from time to time from the control towers at our airfields. Of course no one would want those published in permanent form, for they operate once and are spent. We have quite a variety of things of that character which are spent immediately, and which will be excepted from the application of this act. (*Debates of the House of Commons,* 1950, p. 3040 and 3497).

Thus it was intended that the Act should have a general application with the exception of the Governor in Council's power to exempt certain regulations or certain classes of regulations. The exempting power is found in section 9 (2) of the *Regulations Act*. But in fact there are other express or implied exemptions as well, and we propose to consider them in turn.

(A) *The power of the Governor in Council to exempt any regulation or class of regulations*

Section 9(2) of the *Regulations Act* provides:

> The Governor in Council may by regulation exempt any regulation or class of regulations from the operation of section 3, section 4, subsection (1) of section 6, and section 7, but every regulation made under this subsection shall be published in English and in French in the *Canada Gazette* within thirty days after it is made and shall be laid before Parliament within fifteen days after it is published in the *Canada Gazette* or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

The provisions from which regulations may be exempted are those dealing with the transmission and certification of regulations to the Privy Council, their recording and numbering by the Clerk of the Privy Council, their publication in the *Canada Gazette,* and their laying before Parliament. As mentioned later, to exempt a regulation from the operation of Section 3 means in practice, according to the information given to the Committee, to exempt it from the Privy Council office scrutiny as to form and draftsmanship, and hence from examination under the *Canadian Bill of Rights*. Some form of publicity is given to exemptions made pursuant to section 9(2). This is what Mr. St. Laurent said on this question, when the Act was being debated:

> We had quite a discussion over the necessity of even publishing the order made exempting such things because of their security implications; but the decision was that we wanted to give as complete information as possible, and that we would have to take the risk. If there was something of a legislative character

that was not going to be published we would have to take the risk of describing it as an excepting order, and we would have to make the excepting order public so that all members of parliament could question the propriety of our doing it. We wanted in no way to call attention to everything that was not going to come under the general provisions of the statute.

Mr. Knowles: So that it is clear that there cannot be any completely secret regulations. The regulations themselves can be secret, but only by virtue of an order in council passed under this subsection which exempts those regulations from being published?

Mr. St. Laurent: Yes, and you will have to make the exemption public. It may be that in certain cases we will have to use terms perfectly innocuous to attract as little attention as possible to anything that we think should not be talked about; but nevertheless it will be on the table of parliament and if hon. members choose to talk about it, it will be their privilege to do so. (*Debates of the House of Commons,* 1950, p. 3500).

One must not forget that the *Regulations Act* applies to these exempting regulations; hence, for example, the Governor in Council "may by order extend the time for publication of a regulation and the order shall be published with the regulation" (section 6(2)).

The power given to the Governor in Council by section 9(2) has been used just once, in 1954, when the *Regulations made under Section 9 of the Regulations Act* (P.C. 1954-1787) were made:

Pursuant to section 9 of the Act the following regulations or classes of regulations are hereby exempted from the operation of section 3, section 4, subsection 1 of section 6 and section 7 of the Act:

(1) *Aeronautics Act*—Orders made by the Air Transport Board that do not apply to all carriers or to a class of carrier.

(2) *Atomic Energy Control Act*—Orders made by the Atomic Energy Control Board under the Atomic Energy Regulations of Canada.

(3) *Canada Grain Act*—Orders made under section 11 and orders as defined in section 16.

(4) *Canadian Wheat Board Act*—Orders made by the Canadian Wheat Board as specified hereunder:
   (*a*) Orders entitled "Instructions to the Trade";
   (*b*) Orders addressed to particular persons or corporations only, requiring them to do or to refrain from doing specified things;
   (*c*) Orders adjusting grain storage quotas at delivery points according to the availability of storage space from time to time; and
   (*d*) Orders providing for the allocation of railway cars available for the shipment of grain at delivery points.

(5) *Financial Administration Act*—Regulations that deal exclusively with matters of internal practice and procedure within the Public Service, that do not impose fines or penalties, and that are restricted in their application to persons within the Public Service.

(6) *Indian Act*—Regulations and orders for the control and management of Indian reserves and property, residential and day schools, procedure at band and band council meetings, and generally in respect of all matters of a local or private nature within reserves.

(7) *National Defence Act*—Regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces, that are restricted in their effect to members of or persons attached to the Canadian Forces.

(8) *Penitentiary Act*—Regulations made under section 7.

(9) *Prisons and Reformatories Act*—All regulations made under the Act.

(10) *Post Office Act*—Orders made by the Postmaster General for the guidance and government of officers and employees of the postal service.

(11) *Railway Act*—By-laws, rules and regulations made by the Canadian National Railways under sections 290 and 300.

(12) *Railway Act and other related Acts*—Rules, orders and regulations of the Board of Transport Commissioners for Canada made in the exercise of any power conferred on the Board by the Railway Act or any other Act.

(13) *Royal Canadian Mounted Police Act*—Orders and regulations relating to the organization, discipline, administration and government of the Royal Canadian Mounted Police, that are restricted in their effect to members of or persons attached to the Royal Canadian Mounted Police.

In the 1952-53 session of the House of Commons, a private member's Bill (Mr. Knowles') was introduced to amend the *Regulations Act*. The purpose of the Bill was to abolish the right which the government had under section 9(2) "to pass secret orders in council" (*Debates of the House of Commons,* 1952-53). The Minister of Justice in replying to the motion for second reading did not have time to meet the substance of the arguments made by the mover before the six o'clock recess. However, according to the Assistant Clerk of the Privy Council (Orders in Council), *all* Orders in Council are now available for public scrutiny. (*Minutes of Proceedings and Evidence* p. 222).

Your Committee is of the opinion that, in matters of national security, there should be no general exemptions from the requirements of the *Regulations Act*. Your Committee feels that it is important that every regulation coming within the Act be integrated, according to the Act's procedures, into an organized system of subordinate laws. However, your Committee shall state reasons later for exempting the text of some regulations from the simple requirement of publication.

This requirement would probably be less onerous on the government in practice than it would appear, because in your Committee's view many of the matters covered by the thirteen categories above are not of a legislative character at all and therefore not in any event subject to the *Regulations Act* (unless they impose penalties). In such cases the present exemption provisions have the effect only of making explicit what is already implicit in the definition section of the Act.

Your Committee therefore recommends that, except in the interests of national security, there should be no exemptions from the requirements of the Regulations Act other than as to publication.

(B) *The regulations exempted by section 2(a) (ii)-(vi) of the Regulations Act.*

Section 2(*a*) of the *Regulations Act* provides that "regulation" does not include:

(iii) an ordinance of the Yukon Territory or the Northwest Territories,

(iv) an order or decision of a judicial tribunal,

(v) a rule, order or regulation governing the practice or procedure in any proceedings before a judicial tribunal, or

(vi) a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within subparagraph (ii) ....

Mr. St. Laurent had this to say on subparagraph (v):

> [Those regulations] are required to be published otherwise, and are available in a separate booklet from the King's Printer. That is the reason these rules of practice are made by the Supreme Court, by the Exchequer Court, by the Board of Transport Commissioners and by the Income Tax Appeal Board, and they are available separately for the convenience of those who practise before these tribunals; they can be obtained separately. It was felt that they would not be of general interest to the public at large. They are of special interest to those who practise before these courts but they are not of general interest to the public at large. (*Debates of the House of Commons,* 1950, p. 3497-3498).

It may be noted that the Board of Transport Commissioners and the Income Tax Appeal Board were considered "judicial tribunals". However, the rules of these two bodies are nevertheless published in the *Canada Gazette* (see, respectively, S.O.R. Consolidation, 1955, Vol. 3, p. 2676 and Vol. 2, p. 1870) as are the rules of the Canada Labour Relations Board (S.O.R. 1955, Consolidation, Vol. 2, p. 1981, as amended), of the Immigration Appeal Board (S.O.R. 67-559), and of the Public Service Staff Relations Board (S.O.R. 67-155, as amended). One can only speculate as to the meaning of the term "judicial tribunal". In any event, your Committee thinks that the *Regulations Act* should be amended so that the matters in subparagraph (v) should come under its operation.

Your Committee therefore recommends that rules governing practice or procedure in judicial proceedings should not be excluded from the requirements of the Regulations Act.

Subparagraph (iv) excludes from the operation of the *Regulations Act* the judgments of judicial tribunals.

Subparagraph (vi), when read with paragraph (*i*) is not easy to understand. Private corporations incorporated by or under an Act of Parliament evidently do not come under the operation of the *Regulations Act,* unless their regulations come within subparagraph (ii). In the 1950 Debates, Mr. St. Laurent gave as an example the regulations of the Canadian Pacific Railway which was not "a corporation representing the government" (p. 3498). It is difficult to understand what was meant by Parliament in 1950 when section 2 (*a*) (i) and 2 (*a*) (vi) were adopted. The inclusion in the *Regulations Act* of the expression "agent or servant of Her Majesty" raises a difficult question when it is remembered that a corporation is an agent of Her Majesty not only when an Act of Parliament says so but also when courts of justice say so. (For a review of the main criteria, see *Regina v. Ontario Labour Relations Board, ex parte Ontario Food Terminal Board* (1963) 38 D.L.R. (2d) 530).

(C) *The regulations made under the authority of the Crown prerogative.*

Prerogative legislation, discussed above, is excluded by the definition in section 2(*a*) (i). It must be noted that prerogative regulations would be caught by section 2(*a*) (ii) if they imposed penalties.

(D) *Departmental Directives and Guidelines.*

Your Committee's questionnaire contained three questions relating to the borderline between legislative power, on the one hand, and administrative or executive power on the other. They read:

> 1. With reference to the different types of subordinate legislation which come under the administration of your Department or Agency . . .
> (*d*) Does your Department issue other rules, orders, instructions not included within the terms of the *Regulations Act*—which affect the public? If so, about how many, including amendments, were issued during 1968?
> (*e*) Does your Department issue other rules, orders, or instructions, not included within the terms of the *Regulations Act*—which affect only your own Department? If so, about how many, including amendments, were issued during 1968?
>
> 10. Does your Department or Agency issue documents in the nature of policy statements or position papers which are used by your Department or Agency to implement policies under legislation administered by it? If so, please specify. If so, what steps are taken to bring such documents to the attention of interested or affected persons?"

In general, the answers indicated that the Departments and Agencies have issued a substantial number of documents coming within each of the three questions. It appears that the general reason the documents in question were not considered to come within the terms of the *Regulations Act* is that they were not called "regulations" and, also, were thought to be of an executive or administrative nature and so excluded by section 2(*a*) (i) of the Act.

As mentioned before, it is very difficult in some cases to draw a line between what is a legislative act and what is an administrative or executive act. According to Professor S. A. de Smith,

> Other criteria for distinguishing legislative from administrative acts appear in ordinary linguistic usage. In the first place, every measure duly enacted by Parliament is regarded as legislation. Thus, if a parcel of land is compulsorily acquired by means of a Private Act of Parliament or a Provisional Order Confirmation Act, the acquisition is deemed to be a legislative act; though if the acquisition is effected by means of a compulsory purchase order made under enabling legislation, it will usually be classified as an administrative act. Secondly, departmental instruments or announcements which, although general in application, neither confer legally enforceable rights nor impose legally enforceable obligations are commonly referred to as examples of 'administrative' action. In this sense the decision to allow certain classes of aliens to be heard before a metropolitan magistrate on a question of deportation was administrative. Similarly, Circular No. 9/58, whereby the Ministry of Housing and Local Government invited local authorities to supply objectors and appellants concerned in inquiries into compulsory purchase and clearance orders and planning appeals with fuller particulars of the cases they had to meet, and also announced the Minister's own intention to make several important concessions in the light of recommendations made by the Franks Committee on Administrative Tribunals and Enquiries, was not a legislative instrument, because it was not made in pursuance of express statutory authority and failure to comply with its provisions did not afford a legal remedy to any member of the public; legal remedies became available only when the terms of the circular were translated into statutes and statutory instruments. The position would have been no different if the Ministry or the Minister had purported to issue mandatory instructions to local authorities in such a circular. Just as the Crown is without authority to alter the general law of the land by prerogative, so are its servants and other public authorities without inherent authority to impose legal duties or liabilities or to confer legal enforceable rights, privileges or immunities on the subject. Hence, the extra-statutory concessions to taxpayers that the Inland Revenue authorities announce from time to time cannot be relied

upon in any court of law, although they have been styled administrative quasi-legislation. It must not be assumed, however, that departmental communications issued in the form of circulars, notes for guidance or letters to local and regional authorities, or press notices, are necessarily destitute of legal effect. If they are issued in pursuance of statutory powers which authorise the Minister to confer rights, directly or indirectly, on members of the public, and if the Minister does purport to confer such rights (as where a Minister who is empowered to impose restrictions upon his own powers or the powers of local authorities in certain transactions with members of the public imposes restrictions in a circular letter or other document), the relevant provisions will be recognised and enforced by the courts; and to that extent these informal instruments may be characterised as having legislative effect. (*Judicial Review of Administrative Action,* (2nd ed., 1968) p. 58-59).

It appears from the evidence gathered by this Committee that such decisions are made by the regulation-making authorities themselves. In his evidence before your Committee, the Legal Adviser to the Privy Council Office said with respect to ministerial regulations (the same remark could probably be made for regulations enacted by boards, commissions and corporations):

> In a particular department they may just not send them to me, and if they do not send them, I have no way of knowing whether or not they are complying with the Regulations Act. (*Minutes of Proceedings and Evidence,* pages 223-224).

Mention should be made at this time of section 5 (1) of the *Regulations Act:*

> A regulation is not invalid by reason only that it was not transmitted to the Clerk of the Privy Council, certified or recorded as required by this Act.

Subject to what will be said later on the question of publication (see section 6 (3) of the *Regulations Act*), the operation of the present system of safeguards depends upon decisions made by the regulation-making authority itself. The first decision relates to whether or not to *name* the document in question a "regulation" and to "make" it as such; the second decision is as to whether or not the document so made is made in the exercise of a legislative power.

The evidence before us suggested the possibility that a decision by a rule-making authority that a particular document is not of a legislative character is the way sometimes chosen to remove regulations from the operation of the *Regulations Act*; that could perhaps explain why the *Regulations made under Section 9(2) of the Regulations Act* have not been amended since 1954. The Department of Health and Welfare, in answer to question 1(e) advised:

> It is almost impossible to distinguish in some instances between an instruction issued in the day-to-day administration of the work and an instruction that could be regarded as supplementing legislation. It is more difficult still in retrospect to distinguish between instructions which may affect the public and those which do not affect the public but which affect only the Department.

Reference can be made here to evidence given before your Committee as well as to answers to the above-mentioned questions of our Questionnaire.

It was maintained by the Legal Adviser to the Department of Manpower and Immigration, when reference was made to unpublished directions to immigration officers, that:

> They are not exercises of authority granted under a statute to the Minister, they are explications, if you will, of policy for the guidance of immigration officers in the performance of their duties.
>
> As the answer reflects, there are guidebooks, handbooks and manuals used by immigration officers and other employees of the Department in the performance of their duties. It is necessary, of course, from time to time to give an explication of policy and the manner in which these officers are to exercise their duties in the hope that it will be applied uniformly across the country so that there will not be differences in the application of policy. I think the answer reflects this.
>
> There certainly are these handbooks, they certainly do contain memoranda from time to time which are classified for policy reasons and are not published to the public. The question relating to the United States military deserters is directed at a policy directive of this kind which was indeed issued. (*Minutes of Proceedings and Evidence,* page 197).

Here we have an admission that "policy" affecting a person's rights is explained to departmental officers but is classified information and not published.

In reference to Section 32(4) of the *Regulations* made under the *Immigration Act* (R.S.C. 1952, ch. 325, as amended) which enables an immigration officer to refuse the admission of an independent applicant who meets the norms set out in Schedule A "if in his opinion there are good reasons why those norms do not reflect the particular applicant's chances of establishing himself successfully in Canada . . . ," another departmental witness said, with respect to the policy directives of the department:

> . . . all that was given to our officers in the field was advice, if you wish, or some guidance as to what sorts of things would constitute the good reasons referred to simply in those terms of the legislation, in this case, being the regulations . . . In my judgment, it did not add or subtract from their legal authority or the authority granted in the regulations as to the exercise of their discretion. (*Minutes of Proceedings and Evidence,* pages 198-199).

There would appear to be no argument as to the "authority" of the immigration officer affected by a policy directive. However, it appears clear from all of the evidence that the *manner* in which this authority was exercised, which is the crucial consideration, was directly affected by the directives.

With respect to the classified nature of these directives it was said:

> And as I recall, he [the Minister] took the view that traditionally this type of document which is within the Department has always been considered privileged and has not in fact ever been tabled in Parliament itself. (*Minutes of Proceedings and Evidence,* p. 200).
>
> It may well be that after years of experience and to satisfy present-day conditions, some things that we have tended to view as strictly administrative should no longer be viewed that way. They ought to be dealt with in a different fashion, provided we recognize the pitfalls of tying the administrators of administration into such a bind that in the end they wind up not being able to do what they think should be done because the law will not let them. (*Minutes of Proceedings and Evidence,* p. 201).

The legal adviser to the Department of Manpower and Immigration also had this to say on the nature of the policy directives:

> I would not say that these documents and these instructions in fact tell immigration officers how they are to make up their minds about these things. I believe the direction in question suggested a number of things which might be suitable subjects upon which an immigration officer might base his decision. In that sense, in my view, they probably do not amount to legislative enactments, certainly not in the sense that they tell those officers what they must do.
>
> The officer brings to bear on the decisions he makes his own background of experience and his own views, but we endeavour to insure—and this indeed is the reason why most of these directives exist—that there is uniformity of operation across the country, so that the kind of thing that did happen in a few instances does not recur continually. It is necessary to give instructions of this kind and they are not instructions as to how an officer should make up his mind. They are instructions concerning the kinds of things which he might consider in making up his mind. And if a document of this kind was brought to my attention and if I felt any concern about it violating what was in effect a statutory enactment, I would have said something about it. I did not feel so in this case. (*Minutes of Proceedings and Evidence*, p. 202).

The following are some of the other answers given to our Questionnaire:

The Department of Agriculture, Question 1 (*d*):

> Yes. These are largely instructions to field staff and modifications to inspection manuals. Considering the numerous commodities covered, there would be a few dozen per year . . .
>
> Under the Destructive Insect and Pest Act, Section 7 the Minister is authorized to restrict the movement of vegetation, etc. under certain circumstances and notices are forwarded to affected people and staff about any such restriction. There were four such notices in 1968.

Farm Credit Corporation, Question 1 (*d*):

> The Corporation issues instructions from time to time to its staff with respect to *the interpretation and application of the provisions of the legislation* which it administers and with respect to principles and procedures to be followed in the making of loans. *Such instructions affect that portion of the public who are interested in loans applied for or made.* These instructions, however, are not in the nature of Regulations and would appear to fall within the purview of Question 10 in the Questionnaire and are dealt with thereunder. (Emphasis added).

The Farm Credit Corporation, Question 10:

> Yes. The Corporation issues a Lending Policy Manual with respect to the interpretation and application of the provisions of the Farm Credit Act and the Farm Machinery Syndicates Credit Act. *This manual is intended to provide equitable interpretation and application of the provisions of the Statutes to farmers in all parts of Canada.*
>
> The farming public is informed of the general nature of the credit facilities available under the Statutes by means of information brochures. Those members of the public who indicate an interest in obtaining credit under either of these Statutes are informed in discussions with credit officers of the Corporation about those aspects of our Lending Policy Manual which are applicable to their circumstances. (Emphasis added).

The Department of Manpower and Immigration answered Question 1 (*d*), in part as follows:

> Immigration Officers are provided with Immigration manuals for guidance in carrying out their responsibilities. In 1968 there were 490 amendments to it which come within the area of this question.

The Department of Manpower and Immigration, Question 10:

> . . . There are immigration and manpower handbooks or manuals that are intended to serve as a guide to employees of the Department to assist them in carrying out their duties . . . in a uniform manner throughout the country and abroad . . . In addition, statements on matters of policy require to be modified and added to in the light of changing circumstances and as time goes on. Hence, a series of operations memoranda are sent out from time to time under the same classification as the Manuals, to be included therein, for the added guidance of employees and officers . . . In addition to these documents the handbook, where necessary, elaborates on these regulations to ensure their correct application.

The Public Service Staff Relations Board, Question 10:

> Yes. Shortly after the Board was established, it issued a number of documents which it described as Policy Statements. The purpose of these statements is set out in an introductory note to the first of these policy statements and reads as follows:
>
> > . . . It is obvious that no hard and fast rules can be established at this stage on some of the matters with respect to which the Board will issue policy statements. It is the opinion of the members of the Board that their present thinking on some issues should be made known to employee organizations and the employer to serve as guidelines for the parties in the presentation of their cases to the Board. . . .
>
> These statements dealt with the following matters: the date when an application for certification was to be deemed to have been filed; proof of membership in an employee organization; nature of proof required to show that a council of employee organizations had been properly formed and that the constituent elements of the council had vested appropriate authority in the council; . . . Policy statements are not published in the *Canada Gazette*.

The Department of Transport, Marine Regulations Branch, Question 10:

> Yes. We have issued a 'Concentrates Code' for the guidance of port wardens in determining what is 'approved practice' under Section 624(4) and a document entitled 'Ships Centralized and Automated Control Systems Recommendations' for the guidance of Steamship inspectors in determining what such systems are likely to be approved by the Board of Steamship Inspection. *We expect that eventually, after we gain further experience, these will be converted into regulations.* Our practice is to consult with the industry before these documents are put into final form and to make copies freely available thereafter. (Emphasis added).

If these latter documents can be converted almost verbatim into regulations, and there is statutory authority for such regulations, when it would appear that they are of a legislative nature.

The Department of Veterans Affairs, Veterans Welfare Services Branch, Question No. 10:

> In a few cases Ministerial Orders are issued, normally to define the boundaries of items of discretion in legislation. In such cases, persons applying for benefits are counselled concerning this area in the same manner as if they were contained in the legislation.

The Department of Indian Affairs and Northern Development, Question 1(*d*):

> There are instructions not included within the terms of the Regulations Act which affect the public, issued by this Department, namely instructions and rules laid down for the appropriate use of National Parks facilities. In 1968 prior to the tourist season, numerous new instructions were posted having to do with such things as conduct in the National Parks, use of camp grounds, use of all other facilities in National Parks, for the enjoyment of the public etc.

One may query why these are not in the form of regulations duly published.

Department of Finance, Question 10:

> In administering the Municipal Grants Act an Assessment Manual has been issued for the guidance of the field officers who check on the valuation of Crown property . . . Information concerning the interpretation of the Crown Corporations (Provincial Taxes and Fees) Act is communicated from time to time by circular letters to the heads of Crown Corporations and to Provincial officials concerned . . .

As a result of this oral and written evidence as to the multitude and scope of departmental directives, your Committee is not satisfied that some, perhaps many, directives are not legislative in character. This is a matter on which it was impossible for your Committee to satisfy itself because such departmental directives and guidelines are secret documents, available neither to your Committee nor even to Parliament itself. Your Committee feels that such directives, where they affect the public, ought to be published and subject to parliamentary scrutiny.

5. *The Proposed Definition of "Regulation"*

Your Committee recommends that the Regulations Act should be amended to provide a more inclusive definition of the word "regulation". Section 9 (2) would still enable the Governor in Council to provide for limited exemptions. We would suggest replacing Section 2(*a*) by the following:

> 2. In this Act,
> (*a*) "regulation" means
> (i) a rule, order, regulation, directive, by-law, proclamation, or any other document made in the exercise of a legislative power conferred by or under an Act of Parliament;
> (ii) a rule, order, regulation, directive, by-law, proclamation or any other document made in the exercise of a legislative power conferred by or under the prerogative rights of the Crown and having force of law;
> (iii) a rule, order, regulation, directive, by-law, proclamation or any other document made in the exercise of a legislative power coming within sub-paragraphs (i) and (ii) and which has been subdelegated;
> (iv) a rule, order, regulation, directive, by-law, proclamation or any other document for the contravention of which a penalty or fine or imprisonment is prescribed by or under an Act of Parliament;
>
> but does not include a rule, order, regulation, directive, or by-law or any other document of a legislative character of a corporation incorporated by or under an Act of Parliament, which is not a Crown corporation, unless such a rule, order, regulation, by-law or document comes within sub-paragraph (iv).

This definition casts the net as widely as is reasonably possible. *All* exercises of subordinate *law-making* power are covered (except those of private corporation), and, so that the matter is put beyond doubt, all regulations, etc., for the contravention of which penalties are prescribed, are also covered. Apart from private corporations, the identity of the regulation-making authority should be irrelevant, since we want to cover all such authorities.

Your Committee feels that in the interest of providing a basic safeguard of wide initial application the definition should be cast in these general terms. Your Committee recognizes that there are situations where the publication provisions of the *Act* may not be appropriate or serve any useful

purpose. These cannot reasonably be provided for in the language of a general statute. They should be decided by the Governor in Council on an *ad hoc* basis according to his judgment of what is reasonable and fair.

It should be remembered, however, that the Governor in Council's decisions to exempt regulations or a class of regulations have to be exercised through the medium of regulations (made under section 9(2) of the Act) which will be subject to the general Parliamentary scrutiny which your Committee recommends later in this Report. Your Committee believes, therefore, that it has provided for a safeguard which is suitably all-embracing, while remaining flexible.

In the United Kingdom, in cases of doubt as to whether a regulation made under Acts passed before the *Statutory Instruments Act* 1946 is covered by this Act it is provided that the doubt may be resolved by a Reference Committee appointed by the Lord Chancellor and the Speaker of the House of Commons: *Statutory Instruments Act,* 1946, Section 8(1) (*e*) (iv); S.I. 1948 No. 1, Reg. II. Canadian provincial Regulations Acts contain similar provisions. In the Ontario *Regulations Act,* s. 6, it is provided that:

> 6. The Minister may,
> (*a*) determine whether a regulation, rule, order or by-law is a regulation within the meaning of this Act and his decision is final . . .

The Manitoba *Regulations Act,* provides:

> 6. (1) Subject to subsections (2), (3), and (4), the Registrar may decide whether any regulation, rule, order or by-law, that has been presented to him for filing, is a regulation within the meaning of this Act.

Subsequent subsections provide a procedure for an "appeal" from the Registrar's decision to the Lieutenant Governor in Council. It may be noted that the Registrar has jurisdiction only over those documents which have been presented to him for filing. He does not have the opportunity of making a decision on those documents which may be of a legislative nature and which never leave the Departments.

Section 10 of the Saskatchewan *Regulations Act*, contains virtually identical provisions.

The *Regulations Act* of Canada contains no procedure whatsoever for determining whether or not a document is a regulation within the meaning of the *Act*. With respect to regulations made by the Governor in Council there is probably no problem in this regard. Such regulations have to be processed through the Privy Council Office and the officials of that office would therefore have the opportunity of deciding whether or not a particular document should be subjected to the procedures of the Act. The difficulty relates to regulations which are made by Ministers and by boards, agencies and commissions. As we have said, it appears that whether a document made by a Minister or by a board, agency or commission is processed under the *Regulations Act* depends upon the decision made at the departmental or board, agency or commission level.

Your Committee feels that the *Regulations Act* should prescribe a procedure, along the lines of those obtaining in the other jurisdictions described above, for determining whether a doubtful document is a regulation. In your Committee's view, the procedure should provide that the Minister of Justice be the deciding authority. The chief purpose of such a procedure would be to standardize, as far as is possible, under the chief Law Officer, *all* governmental decisions on whether a document is covered by the *Regulations Act*. These decisions should not be made on an individual basis within each department.

Your Committee states that it recognizes an obvious frailty in this recommended procedure. It relates to the characterization of a document as "doubtful". If a document is considered by a Department to be doubtful then one might reasonably expect that the Department would process it through the prescribed procedure to have the doubt resolved one way or the other. However, it may well be that there are doubtful documents, or even documents which are clearly of a legislative nature, which a department quite erroneously would consider to be of a purely executive or administrative nature. Such documents would never see the light of any doubt-resolving procedures. However, in your Committee's view, this unavoidable defect is not a sufficient reason why the procedure should not be instituted.

Your Committee should also point out that its recommended procedure is in no way intended to oust the jurisdiction of the Courts to decide, in a final and binding manner, where it is material to the judgment in a case, whether or not a document comes within the Act. Nor does your Committee intend to restrict the power to reconsider of the parliamentary scrutiny committee it shall propose.

Your Committee therefore recommends that the Minister of Justice should be charged with the responsibility of deciding for all regulation-making authorities which documents should be classified as regulations.

Your Committee expects that this recommendation would result in many departmental guidelines and directives being classified as regulations. But whether or not this is the result, your Committee believes that in any event they should be published and scrutinized by Members of Parliament. **Your Committee therefore recommends that all departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny.** Interpretation guidelines which instruct examining officers how to exercise their vast discretion in admitting applicants to Canada as landed immigrants are a good case in point.

6. *Criteria for Enabling Acts.*

"In general, if delegation of legislative power is mischievious, the mischief must primarily have been done when the Bill was passed which conferred the power". (Sir Cecil T. Carr, before the Select Committee on Delegated Legislation (1953)).

Acts of Parliament are the main source of regulations. It is Parliament, on the recommendation generally of a Minister, which decides in each enabling Act a) whether power shall be delegated to make subordinate legislation; b) to whom the power shall be delegated; c) the extent of the power; d) the form in which it shall be exercised. Your Committee wishes to emphasize the importance of the care and attention which must be exercised when an enabling provision is being prepared for enactment.

Your Committee shall, shortly, outline ten basic criteria which it thinks should control the form and content of enabling provisions. However, we would first like to discuss certain very general matters which should be considered with respect to the preparation of all such clauses.

(A) *The expression of the power to make regulations*

One may observe with interest the variations in the form of statutory language which conveys the power to make regulations. The "standard" verbal formula is exemplified in the *Regulations Act*:

> 9(1) The Governor in Council may *make regulations*....

There is no equivocation about the nature of the power conferred by this provision.

However in some statutes the power to make regulations is not expressly conferred but is merely implied. Section 3(2) of the *Experimental Farm Stations Act* reads:

> (2) Such farm stations shall be under the direction and control of the Minister, *subject to such regulations as are made by the Governor in Council.*

The foregoing implication is such that it leaves in doubt the nature and scope of the regulations which the Governor in Council is to make. Similar implied powers may be found in the *Explosives Act,* Section 5(2) and the *Foot and Mouth Disease Act,* Section 2(1).

It is fair to observe that the power to make laws should be expressly conferred and this can be achieved if the statutory formula employs the appropriate verb in the active voice.

In several cases the power to make regulations is more than just implied but the expression "make regulations" is not used. For example, see the *Agricultural Co-operative Marketing Act,* Section 4(1): "The Minister *may . . . prescribe . . .*"; the *Agricultural Products Marketing Act,* Section 2(1): "The Governor in Council *may by order grant authority to any board or agency . . .*"; the *Motor Vehicle Transport Act,* section 5: The Governor in Council may *exempt* any person or the whole or any part extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act. We would refer also to Sections 137(1) and 495(1) of the *Canada Shipping Act.*

In your Committee's view, it is important for the application of the *Regulations Act* and for other obvious reasons that, when it is intended that a power is to be exercised by regulation (i.e., it is, generally, a legislative

power), that the word "regulation" find its way into the statutory formula. Where this is done much potential uncertainy can be avoided.

(B) *The importance of apparently minor details in the language employed*

There is much significance in the small phrases and prepositions used in enabling sections. In *The Composition of Legislation* (1957) at pages 149-50 Driedger says:

> Power to make regulations may be conferred, by describing the specific regulation that may be made, by assigning a subject-matter in relation to which regulations may be made or by prescribing a purpose for which regulations may be made.
>
> The Minister may make regulations prohibiting the export of grain.
>
> A section in these terms authorizes the Minister to make a regulation saying, as the statute contemplates,
>
> No person shall export grain.
>
> There is no authority to say anything else and no ancillary regulations are authorized.
>
> The Minister may make regulations respecting the exportation of grain.
>
> This is a wider authority. The regulations to be made are not described, but the Minister has authority to make regulations on a specified subject-matter. Ancillary regulations, and even a regulation authorizing a subordinate official to make a prohibitory order, would come within the authority conferred.
>
> The Minister may make regulations for the purpose of prohibiting the exportation of grain.
>
> Here again, a wide authority is conferred. Any regulation may be made, so long as it meets the test—is it for the purpose prescribed? If outside the statutory purpose, it would be *ultra vires*: but if within the purpose it would be *infra vires* . . .

Examples of enabling Sections of the three types just discussed are, respectively: *The Canada Agricultural Products Standards Act,* Section 5(1); *The Aeronautics Act,* Section 4(1); and the *Animal Contagious Diseases Act,* Section 3.

Your Committee believes that Mr. Driedger's useful analysis of apparently insignificant language should be borne in mind by Members of Parliament when considering enabling provisions in Bills. It is highly relevant to determining the scope of a statutory power.

(C) *Conferring power to make regulations "for carrying out for the purposes and provisions of this Act"*

Such a provision, or some variation of it, is found in most Canadian statutes. At page 148 of *The Composition of Legislation* Mr. Driedger says with respect to such powers: "Such power can, without any harm being done and without causing dispute, be given a fairly liberal interpretation if only administrative regulations are made. But a general power should be narrowly construed (either when drafting the statute or the regulation) if penal regulations are intended. If members of the public are to be punished, or deprived of their rights, by regulations, is it not better to confer the power specifically?" In his evidence Professor H. W. Arthurs said that such powers are "not usually held to sustain anything more than fairly routine procedural regulations." (*Minutes of Proceedings and Evidence.*

page 25). Reference can be made to *Frobisher Limited v. Oak, Canadian Pipelines* (1956-57), 20 W.W.R. (N.S.) 345 (Sask) holding that the general language there in question could not sustain a regulation creating a substantive legal right and, by way of contrast, to *Blackwood v. Bank of Australia* (1874), 30 L.T. 45 at p. 47, where a general enabling provision was given a much wider interpretation.

A variation on the usual theme is contained in Section 61 of the *Immigration Act* which reads:

> 61. The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Act and, without restricting the generality of the foregoing, may make regulations respecting . . . [seven matters are specified].

The evidence of the Legal Adviser of the Department of Manpower and Immigration was to the effect that this general language was authority for Section 32(4) of the Regulations made under the Act—which is the most far-reaching of all of the provisions in the regulations. (*Minutes of Proceedings and Evidence,* page 200). Briefly, this regulation enables an immigration officer to form a subjective opinion on the basis of which he may refuse a person admission to Canada. Your Committee has referred to it above.

The following are other variations on the usual theme of this type of enabling provision:

The Destructive Insect and Pest Act, Section 4(*j*):

> Generally for any other purpose that may be deemed expedient for carrying out this Act, whether such other regulations are of the kind enumerated in this section or not.

The Emergency Gold Mining Act, Section 7(1)(*j*):

> Generally dealing with any matter arising in the course of the administration of this Act, for carrying into effect the purposes of this Act and the true intent, meaning and spirit of its provisions.

The Fair Wages and Hours of Labour Act, Section 6(*k*):

> Generally for the due enforcement of the provisions of the Act and regulations.

The Aeronautics Act, Section 13(*o*):

> Providing for the effective carrying out of the provisions of this Part.

The Cheese and Cheese Factory Improvement Act, Section 7(*f*):

> Any other matter deemed necessary for the efficient enforcement of this Act.

The Civil Service Insurance Act, Section 18(*i*):

> Any other purpose for which it is deemed expedient to make regulations in order to carry this Act into effect.

It should be asked with respect to each statute being prepared whether (*a*) it is necessary to have a general enabling clause in it, and, if so (*b*) whether the clause would vary the standard formula "for carrying out the purposes and provisions of this Act."

Your Committee now sets forth ten fundamental principles which it believes must be kept in mind when statutory provisions enabling regulations

to the made are being prepared. To our minds, these principles represent desirable constitutional and legal values. In some particular statutes the desirable is not possible. The principles are, therefore, intended as presumptions, and not as hard-and-fast rules which should govern in all cases. Where the occasion demands, it may be necessary to depart from one or more of them. However, in such cases, the onus should be upon the Government to justify to Parliament the necessity for a departure from the usual norm.

Your Committee recommends that all enabling acts for regulation-making authorities should accord with the following principles:

(a) The precise limits of the law-making power which Parliament intends to confer should be defined in clear language.

Under this principle your Committee stresses the importance of precision in the expression of the periphery, or outer boundaries, of the law-making power conferred. Such precision reduces difficulties in determining what falls within, and what without, the scope of the power. This determination logically should precede the assessment of an enabling provision against the background of other relevant principles. It is unnecessary to stress that clearly written enabling provisions tend to avoid litigation involving the validity of regulations.

(b) There should be no power to make regulations having a retrospective effect.

Legislation, whether it be in statute or regulation form, which has retroactive effect is generally not looked upon with favour. It involves changing the rules after the game has started. Section 117(2) of the *Income Tax Act* is an example of an enabling provision allowing a regulation to be made having retroactive effect:

> No regulation made under this Act has effect until it has been published in the Canada Gazette but when so published, a regulation shall, if it so provides, be effective with reference to a period before it was published.

At this point it is useful to refer to a portion of the evidence which refers to this provision in the *Income Tax Act* and to other principles respecting the preparation of enabling legislation. The following question was put to the Associate Deputy Minister of Justice:

> Regarding other matters relating to what you find in the enabling legislation, do you have general working criteria? Say you are asked to draw up a bill that involved regulations which would amend another statute or define terms in the instant statute or give a power to subdelegate the power to make regulations or the power to enact retrospective regulations. Do you have certain rules saying that you will not allow this unless it is absolutely necessary?

He answered:

> Absolutely, sir. All of these points are very carefully considered. You have given a number of examples, but let us just take the last one, whether the statute ought ever to confer the power to make retroactive regulations. I think you would concede that you go a long way through the statutes of Canada to find such a power . . . I am thinking particularly of the Income Tax Act which does contain a power to make a regulation which, when it is published, may take effect at a day earlier than the date of its publication. This of course is because of the very special requirements of that law to make regulations that are applicable to entire

taxation years. So a regulation that may be made, for example, in January or February may have to be retrospective in its operation apply to an entire taxation year. But that is a very exceptional power, and that kind of power is not lightly bestowed by any draftsman. (*Minutes of Proceedings and Evidence,* p. 241)

The exception in the *Income Tax Act,* appears, therefore, to be justifiable, but at the same time it strengthens our belief that there should be a general rule, with an onus on the Government to justify exceptions to it.

(c) Statutes should not exempt regulations from judicial review.

It is basic that a regulation not authorized by statute is invalid. However, some statutory provisions attempt to regulate in one way or another the operation of this principle.

The *Excise Act* provides in Section 127:

> All regulations made under this Act shall have the force of law, ...

The French Convention Act, Section 3(2) provides:

> Any order in council or regulation made under this Act shall have effect as if enacted in this Act but may be varied or revoked by a subsequent order or regulation, and shall be laid before both Houses of Parliament as soon as may be after it is made.

The case law appears to indicate that such "boot-strap" provisions do not turn an unauthorized regulation into an authorized one. See Wade, *Administrative Law,* (2nd ed., 1967) at p. 306 and Griffith & Street, *Principles of Administrative Law,* (3rd ed., 1963) at p. 118. Such provisions are, however, potentially dangerous, and, in any event, appear to serve no useful purpose. On this point see Driedger's *The Composition of Legislation* at page 148.

The *Disfranchising Act,* Section 11(2), contains a most unusual provision. It reads:

> Any general rules and orders so made (by the judges of every court constituted for the purposes of the Act) and not inconsistent with this Act shall be deemed be within the powers conferred by this Act, and shall be of the same force as if they were herein enacted.

There is obviously a far cry between something which is not inconsistent with a statute, on the one hand, and something which is not authorized by it, on the other. The same provision can be found in the *Dominion Controverted Elections Act,* Section 83(2). It should also be noted that powers to make regulations which can be exercised on a subjective basis (see subparagraph (i) below) are often immune from effective judicial review. Any statutory provisions which indicate an intention to validate what would otherwise be an invalid regulation demonstrate an unfortunate parliamentary indifference to the legislative process, hardly in keeping with basic constitutional principle.

(d) Regulations made by independent bodies, which do not require governmental approval before they become effective, should be subject to disallowance by the Governor in Council or a Minister.

While independence is the hall-mark of the judicial branch of government, it should be quite alien to the executive branch. The government of

the day should be fully responsible to Parliament, and through it to the people, for all subordinate laws which are made, whether or not the policy embodied therein was initiated within the existing departmental structure or elsewhere. On this subject the Report of the *Royal Commission—Inquiry Into Civil Rights,* at p. 356, observed:

> Subordinate legislative power is a law-making power exercised by persons or bodies subordinate to the Legislature. In its exercise rules having the force of law are formulated as a result of a decision or decisions made on grounds of policy. In accordance with constitutional principles discussed earlier, the exercise of powers to make decisions affecting rights of individuals on grounds of policy by persons or bodies other than the Legislature should be subject to political control. As in the case of administrative powers, political control of subordinate legislative power should be maintained by conferment of power on ministers, either singly or collectively, who are responsible to the Legislature, or on persons subject to the supervision and control of ministers.

In his submissions before this Committee the Minister of Justice observed on this point:

> There is a basis for delegated legislative power which is related to political feeling, for example, where Parliament makes the effort to defuse some area of administration of the appearance of political considerations. I think this is a contentious matter. It is done by the establishment of a board or tribunal, and this board or tribunal is given a mixture of administrative, quasi-judicial and legislative powers. The exercise of these powers, under the general policy laid down by Parliament is administered by a non-political tribunal or body thereafter. Examples of this approach can be found in the National Energy Board, National Transportation Commission, and recent broadcasting legislation.
>
> The feeling is that where administrative decisions have a high political content, Parliament ought to ensure that politics is taken out of those decisions. I am not so sure that this really achieves the results that we are trying to achieve, because any time there is a choice open to an administrator, that is by its essence a political choice. Where an independent board or tribunal is not responsible through a Minister of the Crown to the House of Commons, then I believe Parliament has forfeited and the people through Parliament have forfeited, some of its rights to supervise those boards and to supervise the administration of government .... I think it is fundamental that a minister take the heat for every administrative act of the federal jurisdiction. (*Minutes of Proceedings and Evidence,* p. 228).

Some statutes already provide that regulation-making authorities require the approval of the Governor in Council or of a Minister. See, for example, the *Harbour Commissions Act* (S.C. 1964-65, ch. 32) which provides by s. 13 (1) that the Harbour Commission "may, with the approval of the Governor in Council, make by-laws respecting the management of its internal affairs and the duties of its officers and employees, and for the management and control of the harbour and the works and property therein under its jurisdiction," etc.

Where there is not such an affirmative limitation, we believe that there should normally be a power of subsequent disallowance.

(e) Only the Governor in Council should be given authority to make regulations having substantial policy implications.

Out of 601 Acts surveyed for this Committee, 420 provide for delegated legislation. In 225 of these Acts or statutory provisions the Governor in Council is the authority vested with the power to make regulations. In 93

Acts, several authorities are vested with the power to make regulations, but in 74 of these Acts, the Governor in Council is among the authorities given the power. In 36 of the Acts providing for delegated legislation, the power is given to a Board or a Commission, but it has to be exercised with the approval of the Governor in Council. In 24 other Acts, the Minister of National Revenue is the authority vested with the power; in 8 of them, the power is given to judges; in 7 to the Minister of Agriculture; in 2 to the Registrar General, in 2 to the Secretary of State; in 1 to the Minister of Labour; in 1 to the Minister of National Defence; in 1 to the Postmaster General; in 1 to the Minister of Veterans Affairs; in 1 to the two Speakers of the Houses and in 1 also to the Houses themselves.

Those statistics confirm that the Governor in Council is in Canada the principal regulation-making authority. This fact was also recognized before the Committee by the Associate Deputy Minister of Justice:

> I think you are correct again in stating that in most statutes the power to make subordinate legislation is conferred upon the Governor in Council as being the most reasonable and responsible body to perform that function. This will be particularly true, where, for example, the substance of the regulations have substantial policy implication. (*Minutes of Proceedings and Evidence,* p. 240).

Those statistics also confirm that in Canada much less use is made than in England of ministerial regulations and, also, that the power to adopt regulations is vested in boards and commissions perhaps a little more often than may have been thought.

According to the Associate Deputy Minister of Justice, the choice of the person on whom a rule-making power is conferred "is a matter of judgment in each individual case" (*Minutes of Proceedings and Evidence,* p. 240). Nevertheless, your Committee wishes to emphasize that the first safeguard respecting the device of delegating power to legislate is that the power should be given to a responsible authority. This is the reason that your Committee urges that only the Governor in Council be given authority to make regulations having substantial policy implications.

This principle reflects the same policy as that set forth in (*d*) immediately above. It also appears to be in accordance with the present practice followed by the Department of Justice. The following question was put to the Associate Deputy Minister of Justice:

> What considerations are taken into account as to the subordinate law-making body? For example, what choice leads to the Governor in Council, as opposed to the Minister, as opposed to say a government board or commission that may be operating in that area? I think a review of the legislation indicates that in most cases it is the Governor in Council. What determines that decision?

He answered:

> I think the simplest answer that I can give you is that this is a matter of judgment in each individual case. I think you are correct again in stating that in most statutes the power to make subordinate legislation is conferred upon the Governor in Council as being the most reasonable and responsible body to perform that function. This will be particularly true, where, for example, the substance of the regulations have substantial policy implications.
>
> If on the other hand we are talking about regulations that are purely technical—I have in mind now the sort of thing dealing with air navigation orders, orders

that are made relating to the use of prohibited air space for very limited periods of time, for example, for air force manoeuvres—that is the sort of thing that we would normally regard as being not properly for the Governor in Council but a matter for the Minister to make orders about. One will appreciate that there is often a balance of convenience involved here, that it is somewhat more difficult to obtain readily, and quickly where necessary, regulations by the Governor in Council. It is perhaps more expeditious where the subject matter is of that nature, to provide that the Minister may make the regulation in question.

Further light is thrown on this matter by the Government's answer to question 23 of our questionnaire, which invited suggestions "respecting the improvement of the mode or process of conferring the power to make regulations". The Government replied:

> For the most part, power to make regulations is under Federal Statutes conferred on the Governor in Council. This has certain advantages and disadvantages.
> It is a disadvantage because it is almost impossible for the Governor in Council (which in Canada must be equated to the Cabinet) to examine proposed regulations even superficially, yet, under our theories of Cabinet and party solidarity, the whole Cabinet and party in power must defend them.
>
> If regulations are made by *Ministers,* the same considerations do not necessarily apply. For the most part the Minister would make his regulations himself (with the advice and assistance of his staff and the Department of Justice) and he would take responsibility for them. He would, of course, be well advised to consult his colleagues or Cabinet on important matters of policy, but the ultimate responsibility would be his and not that of the Government collectively.

Your Committee believes that the Governor in Council should remain charged with responsibility for regulations having substantial policy implications. But your Committee also recognizes the fact that too many regulations are being made by the Governor in Council. Many witnesses have told your Committee that more use could be made of ministerial regulations in purely technical matters. The processing of technical regulations through the Cabinet appears to some witnesses to be a time-consuming formality. Thus, your Committee is of the opinion that the power to enact technical regulations should be delegated more often to Ministers. Your Committee agrees with the Associate Deputy Minister of Justice's statement on this question:

> I do not think as a general rule that it is proper to burden the Governor in Council with the making of what I might call purely technical type of orders that do not have a policy content of any substantial nature. (*Minutes of Proceedings and Evidence,* p. 241).

(f) There should be no authority to amend statutes by regulation.

"Amend" is a word of wide import. Your Committee, for its purposes, intends to include the legislative acts referred to hereunder. It will be noted that your Committee refers to existing examples of each type of act:

1. The power to define words in the governing statute: the *Adult Occupational Training Act,* section 12.
2. The power to amend provisions or to add to provisions in the governing statute: the *Narcotic Control Act,* section 14 and the *Dominion Water Power Act,* section 12, (the power to pass regulations "to meet any cases which arise, and for which no provision is made in this Act"). Sometimes

this may be an open-ended power to add to or delete from a statutory schedule.

3. To proclaim acts into and out of force: the *Foreign Aircraft Third Party Damage Act,* section 5.
4. The extension of the time that a statute is to remain in force: the *Maritime Transportation Union's Trustees Act,* section 24(1).
5. The extension of the act to a matter not otherwise covered: the *Canada Grain Act,* section 57(3).
6. The exemption of something which would otherwise be covered by the act: the *Canada Shipping Act,* section 12(2). (This Act is replete with this type of provision).
7. The modification of the provisions of an act: the *Canada Shipping Act,* section 94(7).

The reasoning behind your Committee's recommended principle is stated in the *Report of the Royal Commission—Inquiry into Civil Rights,* page 348, as follows:

> Such delegation of legislative power provokes the comment that the Legislature was not sure what it meant so to avoid making up its mind it delegated the power to decide to another body .... Powers of definition or amendment should not be conferred unless they are required for urgent and immediate action .... The rule should be that the normal constitutional process of amending the parent Act should be followed so that the amendment may be publicly debated in the Legislature.

(g) There should be no authority to impose by regulation anything in the nature of a tax (as distinct from the fixing of the amount of a licence fee or the like). Where the power to charge fees to be fixed by regulation is conferred, the purpose for which the fees are to be charged should be clearly expressed.

This principle, insofar as it bears upon taxation by regulation, is in accordance with well established constitutional principles. Your Committee recognizes that many important aspects of schemes of taxation are governed by regulations and with this practice we have no quarrel. What your Committee objects to is the imposition of the basic liability to taxation by subordinate legislation. Your Committee is of the view that section 7 (1) (*r*) of the *National Parks Act* contravenes this principle. It reads:

> 7. The Governor in Council may from time to time as he deems expedient, make regulations for ...
>
> (1) (*r*) levying taxes upon the interest of any person in land in a Park in order to defray, in whole or in part the cost of the establishment, operation, maintenance and administration of any public works, improvements or utility services referred to in paragraph (*j*) and prescribing that such taxes may be levied with respect to any or all of the following lands, ...

Insofar as the charging of fees is concerned (since it has some similarity to the imposition of taxes) it is important that it be confined to the purpose intended in the statute and that, therefore, this purpose be clearly expressed.

(h) The penalty for breach of a prohibitory regulation should be fixed or, at least, limited by the statute authorizing the regulation.

This principle, which your Committee considers to be an obvious corollary of the principle of parliamentary responsibility in the field of civil liberties, is generally honoured in legislation enacted by the Parliament of Canada. See, for example, section 13(*n*) of the *Aeronautics Act*:

> 13 . . . The Board may make regulations:
> (*n*) prescribing penalties, enforceable on summary conviction for
> (i) contravention of or failure to comply with this Part or any such regulations . . .
> but such penalties shall not exceed a fine of $5,000.00 or imprisonment for six months, or both such fine and such imprisonment . . . .

In *The Composition of Legislation*, Mr. Driedger at pages 147-48 gives convincing reasons why the power to fix penalties by regulation, and not statute, is often necessary:

> There is a further difficulty in setting out the penalty in the Act. One penalty must be selected for all cases. Yet some of the offences may be trifling and others serious. The tendency, therefore, will be to select a penalty too high for many of the offences.

The only statutory provision which we have found that departs from our principle respecting penalties but contains certain safeguards which are not standard is section 1(2) of the *Austria Treaty of Peace Act*, which reads:

> (2) Any Order in Council made under this Act may provide for the imposition by summary process or otherwise of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council.

(i) The authority to make regulations should not be granted in subjective terms.

Powers to make regulations can be conferred in objective or subjective terms. There is a vast difference between the two following examples in the extent of the power conferred:

> The Governor in Council may make such regulations *as may be necessary* for carrying out the purposes of the Act
>
> The Governor in Council may make such regulations *as he deems necessary* (advisable, expedient) for carrying out the purposes of the Act.

There are many typical examples of the way in which power to legislate may be exercised on a subjective basis.

The *Agricultural and Rural Development Act*, section 8 reads:

> The Governor in Council may by regulations make provision for any matters *concerning which he deems regulations are necessary or desirable* to carry out the purposes and provisions of this Act.

The *Agricultural Co-operative Marketing Act* provides:

> 4(1) The Minister may, . . . prescribe . . . (*c*) any other matter *deemed necessary* for the efficient administration of the Act.

The *Canada-Australia Income Tax Agreement Act*, section 4 reads:

> The Minister of National Revenue may make such orders *and regulations as are, in his opinion, necessary* for the purpose of carrying out the Agreement or for giving effect to any of the provisions thereof.

In subject matter, undoubtedly the most far-reaching subjective delegation of legislative powers is found in the *War Measures Act,* R.S.C. 1952, ch. 288:

> 3. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, *as he may* by reason of the existence of real or apprehended war, invasion or insurrection *deem necessary or advisable* for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:
> (*a*) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
> (*b*) arrest, detention, exclusion and deportation;
> (*c*) control of the harbours, ports and territorial waters of Canada and the movements of vessels;
> (*d*) transportation by land, air, or water and the control of the transport of persons and things;
> (*e*) trading, exportation, importation, production and manufacture;
> (*f*) appropriation, control, forfeiture and disposition of property and of the use thereof.

But perhaps the widest of these powers can be found in section 4(1) of the *Migratory Birds Convention Act*:

> The Governor in Council may make such regulations as are deemed expedient to protect the migratory game ... that inhabit Canada during the whole or any part of the year.

The word "expedient" confers a wider scope than the word "necessary".

It is interesting to note that, since 1962, no further use has been made in New Zealand, on principle, of such expressions as "as in his opinion may be necessary or expedient":

> 'Any previous restriction on the power of the Court to enquire into the matter is removed' ... It is clear that the "subordinate" nature of regulations made under [the clause] is preserved and that the rights of persons to test the validity of such regulations in a Court of Law is fully protected. (*Report of the Delegated Legislation Committee,* New Zealand, 1962, p. 8).

(j) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations.

It is obvious that the establishment of such tribunals is of such importance that it should be provided for by statute.

The common criticism of these subjective provisions is that they enable regulations to be made under them which are virtually beyond challenge in the Courts, except as to their constitutionality. The extent of the control of the Canadian Courts of Justice over the legality of regulations is not so extensive, in principle, as that which is exercised by the American Courts of Justice. Under the American doctrine it is for the courts to say whether or not there is a rational relationship between particular delegated legislation and the governing statute; judicial review of the reasonableness of delegated legislation is possible in the United States but not generally in Canada and in Britain. This is why judicial review of delegated legislation is virtually

impossible when the power is granted in subjective terms. This point is well made by Driedger:

> An even wider authority can be conferred by saying:
>
> The Minister may make such regulations as he deems necessary for the purpose of prohibiting the exportation of grain.
>
> Here the Minister is made the sole judge of the purpose, and, in a practical sense, it is not possible to challenge the validity of the regulation. Thus, the War Measures Act of Canada provides that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, *as he may* by reason of the existence of real or apprehended war, invasion or insurrection *deem necessary or advisable* for the security, defence, peace, order and welfare of Canada. The authority to make laws under the above enactment is virtually unlimited, and there is only a theoretical possibility that a specific order or regulation will be held ultra vires. (*The Composition of Legislation* (1957) pp. 149-50).

Parliamentary as well as judicial control is made more difficult by subjective grants of regulation-making power. It would be hard effectively to challenge a ministerial discretion if the only standard of judgment were the Minister's own perception of the exigencies of the situation. Parliamentary scrutiny of regulations could not be successfully instituted as a general practice if all enabling provisions were subjectively phrased, and to the extent that there are any such provisions, parliamentary scrutiny would be weakened.

The Associate Deputy Minister of Justice admitted to your Committee that the purpose of subjective grants of power was to prevent "judicial" review:

> There are many instances . . . where a power is conferred to take whatever steps the Governor in Council or the Minister deems necessary in order to accomplish a stated objective, and usually the way in which you control the breadth of the power is by narrowing the stated objective.
>
> Suppose the law were to say that the Governor in Council may make such regulations as are necessary in order to accomplish a stated objective. Take that as the alternative way of formulating it. Then, of course, the regulation is open to attack as to the validity of its exercise, if in fact the regulation that was so made was not necessary in the judgment of the court . . .
>
> On the other hand, if it is stated that the Governor in Council may make such regulations as he deems necessary in order to accomplish that objective, then presumably so long as the objective is carefully defined and the exercise of the power is not manifestly unreasonable or unjust in its application, then it will not be open to challenge on that ground, on the ground of its necessity alone. (*Minutes of Proceedings and Evidence,* p. 242).

To the further question "what policy reason would you have for not leaving it open to court attack?", the Minister of Justice replied:

> Because it is a matter of policy. The government has to be responsible for policy and not have that judgment substituted by a court. That is the reason. (*Ibid.*, p. 242).

And the Associate Deputy Minister added:

> There are instances when policy on the law is really to accomplish the result intended without endangering the validity of what is being done by an attack in the courts. That is perhaps as simple and bold an answer as I can possibly give you. (*Ibid.*, p. 242).

The McRuer Royal Commission recommended that "powers with subjective limitations should not be conferred except in legislation of an emergency nature" (*Royal Commission—Inquiry Into Civil Rights* (1968), p. 343). In its lengthy answer to our Question 23 requesting suggestions "respecting the improvement of the mode or process of conferring the power, to make regulations", the Government conceded that "the 'deems necessary' formula could be eliminated in all but a few doubtful cases." The Government answer goes on set out in more detail considerations respecting the different types of grants of power.

Your Committee has decided to recommend that as a general rule authority to make regulations should not be granted in subjective terms. The adoption of our rule would leave it open to the Government to justify its language in a particular case where it felt that subjective language was imperative.

We do not wish to rigidify the processes respecting the preparation and passage of bills through Parliament and therefore would not recommend any mandatory procedure to be followed with respect to the scrutiny of enabling povisions. However, **your Committee recommends that the Minister of Justice should, where he deems it appropriate, refer the enabling clauses in any Government bill to the proposed Standing Committee on Regulations at the same time as the bill is referred to the relevant Standing Committee for Committee consideration.**

The repeated reluctance of the Minister of Justice to refer such provisions to the Committee might become subject matter for debate on bills in the House.

In the same spirit of avoiding rigidities we have decided not to recommend such further principles as (*a*) power should not be delegated to make regulations involving matters of policy or principle or (*b*) which trespass unduly on personal rights and liberties. We would certainly hope that enabling acts would not allow regulation-making authorities to infringe the civil liberties of citizens, but we are of the opinion that they are not likely to do so if they conform to our ten criteria for enabling acts. Moreover, scrutiny of this general kind is already provided for under the *Canadian Bill of Rights*. We hesitate also to include a principle as broad as one opposing powers of regulation over matters of policy or principle, because of the interference it might cause to the main operations of the Administration. Again, we feel that our more specific criteria are sufficient.

Chapter 3

Advance Consultation

A common criticism of subordinate legislation is that, unlike Parliamentary legislation, it is, so it is said, made privately and without the benefit of public advice and criticism. We propose to examine the law and practice on this subject in Canada and in other jurisdictions.

Two Canadian statutes provide for a type of formalized consultation, or hearing, prior to the making of regulations. The *Broadcasting Act*, S.C. 1967-68, ch. 25, s. 16(2) provides:

> (2) A copy of each regulation or amendment to a regulation that the Commission proposes to make under this section shall be published in the *Canada Gazette* and a reasonable opportunity shall be afforded to licensees and other interested persons to make representations with respect thereto.

The *Grain Futures Act*, R.S.C. 1952, ch. 140, s. 5(2) provides:

> Before any such regulation is made notice thereof shall first be given to The Winnipeg Grain Exchange and The Winnipeg Grain and Produce Exchange Clearing Association Limited, and each of the said associations or any members thereof shall be given an opportunity to be heard in connection therewith.

These are the only two formal requirements which we have found in Canadian legislation respecting consultations or hearings prior to the making the regulations. With respect to the practice of prior consultation, in the absence of legal requirements, this Committee put to the Departments and Agencies the following questions:

> 11. Does your Department or Agency consult interested or affected persons when preparing regulations so as to obtain their views with respect to the scope and content of the regulations? If so, please advise as to the procedures used, formal or otherwise, for obtaining or implementing this consultation.
> 12. Are parliamentary committees ever consulted in the formulation of your regulations?

The answers to question 11 show that almost invariably departments and agencies consult interested and affected persons and representative parties through meetings, correspondence, telephone calls and even formal hearings. In some cases the proposed regulations are published in draft form for comment and criticism by those affected. This particular method of obtaining assistance exhibits, perhaps, one feature of making laws in

regulation form which gives this form an advantage over statute law, since it is not the practice to circulate draft Government bills prior to their first reading in the House.

The answers to question 12 indicated, generally, that parliamentary committees are not consulted in the formulation of regulations. However, several departments and agencies advised us that the appropriate parliamentary committee has reviewed, with useful effect, existing regulations. During the presentation of its submissions to this Committee, the Department of Manpower and Immigration advised that suggestions made by the Joint Parliamentary Committee on Immigration examining the White Paper on Immigration in 1967 "were in large part incorporated in the resulting regulations of October 1, 1967", even though this Committee did not issue a report. (*Minutes of Proceedings and Evidence,* p. 178). Three governmental agencies advised us that they consulted statutory advisory committees, which, in some cases, are representative of interested persons, prior to the making of regulations: The Farm Credit Corporation; the Canadian Livestock Feed Board; and the Unemployment Insurance Commission.

The variety of comments made by members of the Department of Transport during this Committee's hearings is instructive both as to existing practices and their utility in varying areas of regulations:

> From our experience, I would think, we would get a far better reading of the reaction of the people concerned through informal consultation rather than through a formal public hearing. That is my impression.
>
> I think there are probably two extremes in regulations. One, is the regulation with an extremely complex and highly technical content which affects a relatively small number of people. At the other extreme there are those regulations affecting a large number of people, for example, safety regulations. If it were mandatory to have consultation with these large segments of the population, I think the input from these people would be very beneficial in formulating effective safety regulations and it also would bring to the attention of the public in a very striking manner, I think, by their participation, of the existence and the necessity of having these regulations. Perhaps I would not be prepared to agree that it should be mandatory to have consultation on all regulations, but on specific regulations of a simple nature that affect a large number of people, I think it would, indeed, be beneficial.
>
> There are various types of regulations, administrative directives and that sort of thing that could be made, but one where I do not see advanced consultation as being too practical a possibility would be in the setting of rates and charges—nobody likes a rate increase. Just this past winter we determined an increase in rates and charges for the use of government wharfs which were approved around the beginning of December to take effect April 1. We gave lots of advance notice to the industry that these rates and charges were going up and in this way they were advised, but there were no public hearings or meetings at which we said, 'Do you mind if we raise this rate from 40 cents to 50 cents'?" (*Minutes of Proceedings and Evidence,* pp. 172-73).

In the United States the *Administrative Procedure Act,* 1946, provides for certain minimum procedures to be followed by federal agencies before they make laws. Section 4 thereof provides, in part:

> Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency

management or personnel or to public property, loans, grants, benefits, or contracts—

(*a*) Notice—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(*b*) Procedures—After notice required by this section, *the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner;* and after some consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection. (Emphasis added).

We find the exceptions to these minimum requirements are as significant as the requirements themselves.

Professor Abel, of the Faculty of Law in the University of Toronto, who has had considerable academic and practical experience in American administrative law, outlined to this Committee four different methods of obtaining advance participation in the subordinate legislative process in the United States—based substantially on the analysis described in Professor Ralph F. Fuchs' *Procedure and Administrative Rule-making*, 52 Harvard Law Review 259 (1938). Professor Abel said:

> I do not think that categories of concepts can be rigidly adhered to in this connection, but he [Fuchs] indicates four general types: one, investigative, two, consultative, three, conferences, and four, adversary.
>
> The first one, investigative, is the sort of correspondence inquiries that are addressed, when a regulation is intended, to persons who might be thought to be interested. The initiation by the department for requests for information to such other government departments or officials as it thinks can usefully supply information.
>
> The consultative one stresses actually the existence of advisory committees, which undoubtedly are useful devices that can be employed. If there is not an official advisory committee constituted, the trade associations, unions, and other regularly operating groups in the area—who might have sentiments on the matter—are solicited and their opinions are utilized advance at the preparation of the regulation.
>
> The conference method contemplates the assembly of a group of people at a designated time and place, or designated times and places, where they meet to discuss the possible content of regulations in a certain area.
>
> The adversary one, as its name implies, suggests something in the nature of a formal trial or hearing with the presentation of witnesses and the evidences of records. They are in a somewhat ascending order of formality and formalism.
>
> It is suggested—and I think that the suggestion is undoubtedly true—that the propriety of employing one or other of these methods or, perhaps, some variant, is dependent upon a number of factors. You cannot have appropriately the same

kind of operation incident to the formulation of every kind of regulation. Such matters as the character of the parties affected, the nature of the regulations, the nature of the agency or department itself, and its personnel, in similar matters will govern, from time to time, the choice of one or the other of the methods. (*Minutes of Proceedings and Evidence,* p. 67).

He then offered some examples, which in his view, illustrated that advance consultation was not always desirable:

There are undoubtedly types of regulations where nothing in the way of advance consultation, or formal activity outside of the department itself, is required or would be appropriate. I have in mind, for instance, such matters as one sees gazetted year after year, and quite properly, prescribing the open seasons and the game limits for fishing in the various waters of Canada. This is something that must be handled that way but where the matter is repetitive, and where there would seem to be no necessity for going outside for any information.

Take another kind of situation of somewhat the same order. I know it is the policy of the Government of Ontario now—and I should think, perhaps, it is that of the Government of Canada, judging from a casual survey of the legislation—no longer to attempt to fix in statutes a prescribed scale of fees or money levels from time to time but to allow these to be fixed by Order in Council. This takes into account the varying values of money and the circumstances that there have been over the course of years which indicate something of an inflationary tendency. There is certainly no point where we are trying to do something like adjust a scale of fees from time to time to hold hearings on that matter. This is the kind of thing that does not adapt itself well to that.

There are other kinds of matters that one can recognize—although they would certainly be exceptional—where a sudden and grave emergency arises and here there would hardly be time to have any sort of a preliminary consultation. This again, must be taken into account. (*Minutes of Proceedings and Evidence,* p. 67).

Professor Fuchs, at pages 265-66 of the article referred to, discusses the possible variations in relevant factors, giving examples, bearing on the relevance of formalized prior consultation and hearings:

Administrative rule-making procedure necessarily requires adaptation to the varying circumstances under which general regulations are prescribed by administrative action. Thus a regulation applying to the railroads of the United States permits, if it does not require, an antecedent procedure involving a full hearing to the affected parties, whereas a rule of the Bureau of Marine Inspection and Navigation applying to thousands of unknown owners of small boats can scarcely be preceded by an investigation of the same character. It is one thing, moreover, to lay down a simple regulation governing a particular aspect of the use of streets by motorists, and quite another to prescribe the detailed accounting practices of a large group of utilities in matters of great technical difficulty affecting claims to large sums of money. There is an equally important distinction between regulations put forth with an eye single to the maintenance of a smooth-working routine in the conduct of a public service, and the highly discretionary code of financial controls by which it is sought to direct, in part, the workings of a credit economy.

A single official, moreover, who perhaps is only intermittently in touch with the problem to be governed, may proceed quite differently in arriving at a regulation from the way in which a board of experts or of representative character is likely to attach a rule-making problem. Finally, a regulation whose breach entails simply the loss of a minor privilege is quite different from one whose violation may result in a penitentiary sentence.

Between the extremes which these examples represent many shades of difference may be found. The aspects of rule-making which determine the significant categories for procedural purposes may, however, be grouped under the following headings: (1) the character of the parties affected; (2) the nature of the problems to be dealt with; (3) the character of the administrative determination; (4) the

types of administrative agencies exercising the rule-making function; and (5) the character of enforcement which attaches to the resulting regulations.

In the United Kingdom the *Rules of Publication Act, 1893*, provided that public notice should be given to proposals to make "statutory rules" and the departments concerned had to consider representations or suggestions made by interested parties, who were made aware of the proposed rules by the public notice. This provision was repealed in 1946. Dr. Kersell has commented on this pre-1946 practice as follows:

> All interested and affected parties were invariably consulted long before it became necessary to consult them under ... the Rules of Publication Act, 1893. To then publish notification and wait the required forty days simply wasted time. (*Parliamentary Supervision of Delegated Legislation* (1960), p. 8).

While there is now no general requirement in the United Kingdom as to giving notice prior to the making of subordinate legislation, informal and various types of formalized consultations usually take place. Significant use is made of statutory advisory committees which must be consulted prior to the making of regulations. The general practice may well be reflected in the following evidence which was given before the Committee on Ministers' Powers:

> No Minister in his senses with the fear of Parliament before his eyes would ever think of making regulations without (where practicable) giving the persons who will be affected thereby (or their representatives) an opportunity of saying what they think about the proposal. (See Minutes of Proceedings and Evidence, pages 35-36(4). (Quoted on Pages 127-28 of Griffith & Street, *Principles of Administrative Law* (3rd ed., 1963)).

Professor H. W. R. Wade in his *Administrative Law* (2nd ed., 1967) at page 317, sums up the British position and offers his own views on compulsory consultation:

> Consultation before rule-making though usually not required by law, is in fact one of the major industries of Government. That being so, it is doubtful whether anything would be gained by imposing more general legal obligations and formal procedures. At any rate, no such reform has been demanded.

It may be noted that the recent *Report of the Royal Commission—Inquiry into Civil Rights* (February, 1968) concluded that "advance publication of regulations before they are made is not required in Ontario as a necessary safeguard of the rights of individuals who may be affected. Compulsory antecedent publication and consultation would cause unnecessary delay and merely duplicate the time already spent in informal consultation." (page 364).

The advantages of prior consultation before the making of regulations is obvious, and **your Committee therefore recommends that, before making regulations, regulation-making authorities should engage in the widest feasible consultation, not only with the most directly affected persons, but also with the public at large where this would be relevant. Where a large body of new regulations is contemplated, the Government should consider submitting a White Paper** (as in the case of the White Paper on Immigration, discussed above), **stating its views as to the substance of the regulations,**

to the appropriate Standing Committee, which might conduct hearings with respect thereto. It is essential that all relevant facts and viewpoints should be taken into account before regulations are finally made.

Having said this, we should state that we are of the opinion that no useful purpose would be served by laying down in legislation of general application minimum procedures respecting prior consultation or hearings which would apply to the making of all regulations. However, **your Committee recommends that, when enabling provisions and statutes are being drawn, consideration should be given to providing for some type of formalized hearing or consultation procedure where appropriate,** e.g. where all affected parties may be easily identifiable and the matters to be covered by the regulations lend themselves to a hearing or consultation type of procedure. It should be left to the individual enabling sections, where feasible and practical, to provide for the appropriate type of consultation procedure.

Chapter 4

The Drafting of Regulations

It is difficult to over-estimate the importance of good drafting in the regulation-making process. It is important that regulations be drawn with the same care and attention as statutes. We refer to the following observations on this point:

> An administrator who keeps steadily in view the intelligibility of his regulations finds his work facilitated in three ways. First, it is very much easier to bring a measure into operation among people who understand it. Secondly, the area of controversy is defined by the elimination of mere misunderstanding and misrepresentation. Thirdly, but certainly not least important, it is only by carrying the terms of the law down to the particular case of John Smith that the administrator can tell whether he has covered the ground. Omissions disclose themselves, anomalies start to light, and the system, as it gains in adaptability, advances equally towards precision, completeness, and fairness. (A letter in The Times (London), February 22, 1935 quoted in Frankfurter & Davison, *Cases on Administrative Law* (2nd ed., 1935) p. 211 at page 212).
>
> The importance of good drafting cannot be over-emphasized and the more resort to delegated legislation is practised by Parliament, the more necessary is it that its draftmanship should be uniformly good ... Prevention is both better and less expensive than cure. If ten cases of ultra vires regulations occur to-day, and nine of them would be avoided by a general improvement in the standard of drafting, it is obvious that an important public advantage would be achieved, and one peculiarly relevant to the object of our reference. If we assume that legal proceedings result in two or three of the ten cases, the saving of expense direct and indirect which would result is in itself a public economy. But the value of good drafting is not limited to the avoidance of illegalities. In the ordinary life of the community what is above all important is that legislation, whether delegated or original, should be expressed in clear language. (*Report of Committee on Minister of Powers,* 1932, Cmd. 4060, at p. 50).
>
> Finally, I repeat a point that I have made: regulations should be intelligible to the person affected by them ... There is no more important principle than intelligibility when you are dealing particularly with laymen. (Professor H. W. Arthurs, *Minutes of Proceedings and Evidence,* pages 14-15).

Before dealing with our recommendations respecting improvement in the drafting of regulations, it is well to repeat the provisions in existing laws on this subject.

P.C. 1954-1787, made under the *Regulations Act*, provides in Section 4:

> Two copies of every proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with

the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards.

The *Canadian Bill of Rights,* S.C. 1960, c. 44, s. 3, provides:

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* . . . in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any inconsistency to the House of Commons, at the first convenient opportunity.

Sections 4 and 5 of the S.O.R./61-16, made under the *Canadian Bill of Rights,* provide:

4. A copy of every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* shall, before making of the proposed regulation, be transmitted to the Deputy Minister of Justice by the Clerk of the Privy Council.

5. Forthwith upon receipt of a copy of a proposed regulation transmitted by the Clerk of the Privy Council pursuant to Section 4, the Minister shall

(*a*) examine the proposed Regulation in order to determine whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Bill of Rights;* and

(*b*) cause to be affixed to the copy thereof so transmitted by the Clerk of the Privy Council a certificate, in a form approved by the Minister and signed by the Deputy Minister of Justice, stating that the proposed Regulation has been examined as required by the *Canadian Bill of Rights;*

and the copy so certified shall thereupon be transmitted to the Clerk of the Privy Council.

6. Where any of the provisions of any Bill examined by the Minister pursuant to Section 3 or any of the provisions of any proposed regulation examined by him pursuant to Section 5 are ascertained by the Minister to be inconsistent with the purposes and provisions of the *Canadian Bill of Rights,* the Minister shall make a report in writing of the inconsistency and shall cause such report to be deposited with the Clerk of the House of Commons in accordance with Standing Order 40 of the House of Commons at the earliest convenient opportunity.

It would appear from the evidence given to this Committee by the Legal Adviser to the Privy Council Office that the examination of regulations pursuant to the *Regulations Act* regulation is mainly as to legal validity, form and efficacy. He said:

Proposed regulations are submitted either to [the Assistant Clerk of the Privy Council, Orders in Council] or to myself for approval as to form and draftsmanship. At that point I take the draft regulations, try to review them carefully to understand just what they are trying to do in their proposals. Quite often that requires lengthy consultations with officials in the particular department putting them forward. On any particular set of regulations this may require three, four or sometimes ten meetings with the officials in order to get the precise intentions expressed in the regulations. On others they will be shorter and consultations will not be required at all. (*Minutes of Proceedings and Evidence,* p. 212).

As far as "*the* established standards" referred to in Section 4 of the *Regulation made under the Regulations Act,* are concerned, we were advised that these mean "high standards of legislative drafting generally". (*Minutes of Proceedings and Evidence,* p. 219). (The transcript, which says "apply standards of legislative drafting generally" is incorrect). Nowhere are any "standards" expressly laid down.

As far as the *Canadian Bill of Rights* scrutiny is concerned we were advised:

> It really comes down to a personal interpretation of the Bill of Rights. The Bill of Rights appears to be very clearly written. Two main considerations I have to apply which I find most often possibly not observed when a proposed regulation is submitted to me are, first, the one requiring that the person have a fair hearing where a right is going to be taken away from him, and second, discrimination of one form or another. Those are the main violations, if you will, that I find in proposed regulations. (*Minutes of Proceedings and Evidence,* p. 213).

Two comments may be made. First, it is fair to observe that not all lawyers and parliamentarians would share the same feeling about the ease of application of the *Canadian Bill of Rights.* Secondly, it appears that the practice is not to report an inconsistency with the purposes and provisions of the Canadian Bill of Rights to Parliament, as provided for in the statute, and the regulations made thereunder, but to continue to work with successive drafts of the regulation until the inconsistency has been removed. We have no fault to find with this technique, but the burden it imposes on the Department of Justice is considerable.

We were advised that in 1968 some 528 draft regulations were presented to the Clerk of the Privy Council and examined by the Legal Adviser. Nearly all of these drafts required revision or reconsideration as a result of examination by the Legal Adviser. (*Minutes of Proceedings and Evidence,* p. 226). The burden imposed on the Legal Adviser, who now works without any direct assistance, is all the more appreciated when it is considered that regulations may vary from one page to 150 pages and, as we were advised, some drafts require up to ten meetings with departmental officials.

It would appear, generally, that the present form of scrutiny, as far as pure legal draftsmanship is concerned, is serving a useful purpose and is resulting in a better quality of regulations than we would have without it. In answer to one of the questions put to the departments and agencies in this Committee's Questionnaire, we were advised that at some point in the drafting process of a regulation (generally not at the beginning), the Legal Adviser to the department in question, who in most cases is a Department of Justice Officer, either prepares or revises the regulation.

The Minister of Justice advised us, that "the Department of Justice performs primarily a review function in relation to drafting regulations. We perform that review function primarily under the authority of two statutes, the Regulations Act and the Canadian Bill of Rights . . . Neither of these statutes [gives] the Department a very dynamic or positive role at the drafting stage. . . We [have] very little to do with the preparation of regulations". (*Minutes of Proceedings and Evidence,* pp. 225 and 227). The Minister further advised us that he intends to institute a programme of training seminars for the benefit of the legal officers coming under the jurisdiction of the Department. Attempts are being made to enlarge the Legislative Section of the Department of Justice and to get the seminars underway. (*Minutes of Proceedings and Evidence,* p. 226).

By way of answer to a further question in this Committee's Questionnaire we have been advised that the majority of regulations are drafted initially in English and are translated into French after they have been approved by the Legal Adviser to the Privy Council Office. In some cases, in the interest of speed, translation commences much earlier in the drafting process. Most departments indicated that there was negligible delay occasioned by translating a regulation but some answers indicated that there was considerable delay—up to six weeks, in some cases—occasioned by the necessity to translate regulations. We understand that the Royal Commission on Bilingualism and Biculturalism will be reporting in considerable detail on the question of the translation of regulations into French or English, as the case may be. The only observation which we can make at this point is the obvious one that, if insufficient qualified translation personnel are responsible for any significant delay in the making and bringing into effect of regulations, it is a matter which requires urgent attention in the way of increased staff and training.

Your Committee recommends that the Government should take all necessary steps to facilitate the expansion of the Legislative Section of the Department of Justice and to provide thorough training for legal officers in the Department, including those seconded to other departments, in the drafting of regulations. At the present time far too heavy a burden is placed on the Legal Adviser to the Privy Council Office. This burden should be shifted to the departments and agencies responsible for producing draft regulations for examination by this Office and this can only be accomplished by improving the quality of draftsmanship at the departmental level by the Department of Justice lawyers there.

We are of the opinion that the present procedure for examination as to form and draftmanship should continue. It is a useful device to enable the Government to ensure, to some extent, a uniformly high standard of executive and administrative law-making. The subsequent legislative scrutiny which we recommend later in this Report should in no way relieve the executive from responsibility for producing laws drawn in accordance with the highest standards of draftmanship.

It is of interest, as far as existing practices are concerned, to refer to a document prepared by the Privy Council Office entitled "Recommendations to the Governor in Council" respecting the procedure laid down by that Office to be followed by departments preparing recommendations which will result in Orders in Council of all types—executive, administrative and legislative. This document has some bearing on the drafting of regulations. We quote the following portions thereof:

> 2. The usual format for recommendations to the Governor in Council . . . should contain, in as brief a form as is consistent with clarity, a statement of the background to the recommendation, and the reasons for making it. In the last, executive, paragraph, the exact *statutory authority* (name of act, section, subsection) should be cited, and a *complete statement of the action contemplated,* following as closely as possible the phraseology of the relevant legislation.

4. . . . It is necessary for Council to understand fully the purpose of the action they are being asked to approve. Departments should therefore send with a recommendation of this kind a very short explanatory memorandum. Such a memorandum should clearly indicate and explain the change from the previous situation which the recommendation is designed to achieve, (e.g. an increase in membership of a government board resulting from changes in legislation; an increase or decrease in licence fees and the reason for it).

12. Departmental officials preparing recommendations to the Governor in Council should consult with the legal adviser of their department to ensure that recommendations meet the requirements of the law.

15. Recommendations in this category should not be submitted to the Minister for signature until they have been approved as to form and draftsmanship by the legal adviser to the Privy Council Office.

16. After a submission in this category has been approved as to form and draftsmanship, it should then be presented to the Minister for signature. After Ministerial approval it should be forwarded to the Privy Council Office together with *five* copies in English and *two* in French of the schedule of regulations or amendments to regulations. (Previously the requirement was for *five* copies in English and *one* in French). These copies are required in order to process the resulting order in council for publication in the French and English editions of the Canada Gazette Part II. (*Minutes of Proceedings and Evidence,* pages 246, 247, 248.)

We note with interest the instruction contained in recommendation 2 as to the citing of the precise statutory authority for the action contemplated. We are of the opinion that it is more than just a matter of good form for a regulation, itself, to contain a statement of the specific statutory section(s) or sub-section(s), as the case may be, which authorize the making of the regulation. This practice is not always followed: see *Minutes of Proceedings and Evidence,* p. 223.

Two other points relating to the substantive aspects of drafting should be mentioned. First, the draftsmen of regulations pursuant to existing statutes should pay close attention to the criteria respecting the drafting of enabling provisions which we refer to in Chapter 2 of this Report. While some of these existing provisions may be defectively drawn, according to our recommended criteria, this should not afford an excuse for the making of defective (from our point of view) regulations thereunder. Secondly, the criteria which we recommend with respect to the work of the proposed Standing Committee on Regulations should also, obviously, serve as a guide to draftsmen of regulations. The fewer the confrontations with this Committee the more effectively our proposed system will be working.

Your Committee therefore recommends that the present examination of regulations by the Privy Council Office as to form and draftsmanship and by the Department of Justice as to conformity with the Canadian Bill of Rights should be continued, and that the scrutiny by the Department of Justice should also take into account the other criteria for regulations proposed in this Report.

Chapter 5

Commencement of Operation of Regulations

There is nothing in the *Regulations Act* respecting the commencement of operation of regulations. Reference has to be made to the *Interpretation Act,* S.C., 1967-68, c. 7, s. 6(2) which provides:

> (2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force upon the expiration of the day immediately before the day the enactment was enacted.

By virtue of section 2 (1) of the *Interpretation Act* "enactment" means an Act or a regulation or any portion of an Act or regulation, and "enact" includes to "issue, *make* or establish" (emphasis added). It is, therefore, clear that unless the enabling statute, or the regulation itself, states that the regulation is to come into force on a particular day, it shall come into force at midnight preceding the day it is made.

With the exception of regulations made in the form of orders in council, which require the signature of the Governor General, there is, generally, little, if any, formality associated with the making and coming into force of a regulation. Regulations become operative law upon their execution by the regulation-making authority and without any further procedure. This lack of formality ill accords with the degree of openness which we believe should be associated with law-making, particularly having regard to the possibility that there may have been no antecedent publicity respecting the making of the regulation. One may contrast the publicity given to Bills passing through Parliament and the formal act of Royal assent which "shall be the date of commencement of the Act, if no other date of commencement is therein provided." (*Interpretation Act,* s. 5(1)).

Further, in the realm of subordinate legislation itself, this informality may be contrasted with procedures applicable in some, if not all, of the provinces in Canada and those in the United Kingdom. The *Regulations Act* of Manitoba (R.S.M. 1954, c. 224, s. 3) provides:

> 3. (1) Every regulation or a certified copy thereof shall be filed in duplicate with the registrar.

(2) Unless a later day is provided, a regulation shall come into force on the day it is filed with the registrar *and in no case shall such regulation come into force before the day of filing.*

(3) Unless expressly provided to the contrary in another Act, *a regulation that is not filed as herein provided shall have no effect* .... (Emphasis added).

See also section 5 of the *Regulations Act* of Saskatchewan (R.S.S. 1965, ch. 420) and sections 3 and 4 of the *Regulations Act* of Ontario (R.S.O. 1960, ch. 349) both of which contain similar but more elastic provisions with respect to the coming into force of a regulation.

In the United Kingdom the *Statutory Instruments Act,* 1946 provides:

4. (1) Where by this Act or any Act passed after the commencement of this Act any statutory instrument is required to be laid before Parliament after being made, a copy of the instrument shall be laid before each House of Parliament and, subject as hereinafter provided, *shall be so laid before the instrument comes into operation*:

Provided that if it is essential that any such instrument should come into operation before copies thereof can be so laid as aforesaid, the instrument may be made so as to come into operation before it has been so laid; and where any statutory instrument comes into operation before it is laid before Parliament, notification shall forthwith be sent to the Lord Chancellor and to the Speaker of the House of Commons drawing attention to the fact that copies of the instrument have yet to be laid before Parliament and explaining why such copies were not so laid before the instrument came into operation. (Emphasis added).

In Canada there is legislative machinery respecting the processing of regulations *after* they have been made. The *Regulations Act* provides:

3. (1) Every regulation-making authority shall, within seven days after it makes a regulation, transmit copies of the regulation in English and in French to the Clerk of the Privy Council.

(2) A copy of a regulation transmitted to the Clerk of the Privy Council under subsection (1), other than one made by the Governor in Council or the Treasury Board, shall be certified by the regulation-making authority to be a true copy of the regulation.

4. (1) The Clerk of the Privy Council shall maintain a record in which he shall record the regulations transmitted to him under Section 3 and the regulations made by the Governor in Council or the Treasury Board.

(2) Every regulation recorded under this section shall bear a number assigned to it by the Clerk of the Privy Council, but all copies of the same regulation, whether they are in English or in French, shall bear the same number.

5. (1) A regulation is not invalid by reason only that it was not transmitted to the Clerk of the Privy Council, certified or recorded as required by this Act ....

P.C. 1954-1787, (S.O.R. Consolidation 1955, p. 2676) made under the *Regulations Act,* provides:

5. Three copies in English and one in French of every regulation, one copy of which shall be certified, shall be transmitted to the Clerk of the Privy Council, in accordance with section 3 of the Act.

6. When received and recorded pursuant to section 3 and 4 of the Act, regulations shall have affixed to them by the Clerk of the Privy Council the designation 'SOR' followed by an appropriate number.

Your Committee recommends that the Regulations Act should provide, as a general rule, that a regulation shall not come into force until the date on which it is transmitted to the Clerk of the Privy Council. (In Chapter 6 we

shall consider the provision for, in certain cases, later dates for the commencement of operation or regulations). This would not appear to impose any undue burden on the Administration as, in most cases, a regulation could be so transmitted immediately upon making. It would involve an improvement over our existing law in that a regulation would become a document of public record and integrated into an organized accumulation of delegated public law from the time of its commencement.

There may be cases where, by reason of geographic distances or other factors, it would not be possible to transmit immediately to the Clerk of the Privy Council a regulation concerned with, say, a situation of an emergency nature. In such cases, if the regulation so provided, it should come into effect upon its making and be transmitted to the Clerk "as soon as possible".

Your Committee therefore recommends that in cases of emergency a regulation might come into effect at the time of making. As a precedent for his type of provision reference can usefully be made to the provision to section 4(1) of the Statutory Instruments Act, 1946, set forth above.

Chapter 6

The Publication of Regulations

1. *Whether to Publish*

The importance of publishing regulations is obvious. If the general purpose of law is to make human actions conform to certain standards then there must be adequate publicity given to laws of all kinds before compliance therewith can be reasonably expected.

We have indicated above in Chapter 2 the ways in which a regulation may avoid being "caught" by the *Regulations Act*, and hence, being published. We have referred to, and quoted, the *Regulations Act*, section 9(2) and section 9 of the *Regulation* made thereunder which provides for the exemption from publication, and from other *Regulations Act* requirements, of regulations made under thirteen particular statutes. As noted, we understand that the Privy Council Office takes the view that any regulations referred to in section 9 of the Regulation are also exempt from the form and draftsmanship examination required by section 3 of the Regulation. According to the strict language of section 9 of the Regulation, this does not necessarily follow. This approach of the Privy Council Office also has the effect of allowing exempted regulations to avoid *Canadian Bill of Rights* scrutiny.

The Government has presented us with a combined answer to questions 16 and 18 of our questionnaire. Question 16 asked: "What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the *Regulations Act*?" Question 18 read: "What circumstances would, in your view, justify the exemption from publication of a regulation?"

The Government's answer is as follows:

> Extension of the time normally allowed for publication of a regulation under section 6(1) of the *Regulations Act*, R.S.C. 1952, Chapter 235 and exemption from publication of a regulation may from time to time be justified in the following circumstances:
>
> (*a*) where notification or other form of communication would be more appropriate;
>
> (*b*) where the safety and security of the country or part of it might be adversely affected;

(*c*) where information might be disseminated which could deleteriously affect Canada's foreign relations;
(*d*) where the regulation involves the distribution of information which might adversely affect the relations of the provinces *inter se*;
(*e*) where the regulations are of limited application and involve the granting of privileges or the relaxation of rules;
(*f*) where other conditions from time to time necessitate that a regulation should be exempt from publication or that its publication be postponed provided that the provisions of the *Regulations Act* are complied with;
(*g*) an extension of the time normally allowed for the publication of a regulation may be necessitated where the matter is one of urgency.

We are prepared to accept the validity of all these circumstances, but we believe that in such cases, as we said above in Chapter 2, there should not be a corresponding exemption from the other requirements of the *Regulations Act*.

In other words, **your Committee recommends that section 9 of the Regulations Act, which allows exemptions from the provisions of that Act, should be amended to provide for exemptions from publication and time of publication only.** Hence, all of the other provisions of the Regulations *Act,* and the *Regulations* made thereunder, would continue to apply: the examination as to form and draftsmanship (including Canadian Bill of Rights scrutiny), transmittal, certification, recording, numbering and laying. Regulations which are expressly exempted from publication only should be described in *Votes and Proceedings* of the House of Commons as outlined in Chapter 7, following their laying before the House. The information respecting such regulations which we recommend should be set forth in *Votes and Proceedings* should be also published in the *Canada Gazette.* They would then be available for examination notwithstanding their non-publication.

As mentioned above, we were assured by the Assistant Clerk of Privy Council (Orders in Council) that there are, as far as his office is concerned, no Orders in Council which are secret, regardless of non-publication. (*Minutes of Proceedings and Evidence,* page 222). This is as it should be, and all regulations, regardless of the regulation-making authority, should stand in this position. It is useful to refer to the provisions of section 9 of the *Regulations Act* of Saskatchewan (R.S.S. 1965, c. 420) which provides as follows:

> 9. (1) During the regular office hours of the registrar and upon payment of the prescribed fees, every person shall have access to and be entitled to inspect any regulation filed with the registrar.
> (2) No person shall be required, as a condition of his right of inspection under subsection (1), to disclose the name of the person for or in respect of whom such access or inspection is sought.
> (3) The registrar shall, upon request accompanied by payment of the prescribed fees, produce for inspection or furnish a copy or a certified copy, as the case may require, of any regulation filed with him.
> (4) The fees payable for services under this section shall be such as may be prescribed by the Lieutenant Governor in Council.

We are of the opinion that, subject to one qualification, a similar provision should be enacted in the *Regulations Act.* We do not believe that a fee

should be charged for the inspection of a regulation. It is, however, reasonable that an appropriation fee should be paid to cover the cost of obtaining a copy thereof. Since the great bulk of regulations will be published in the *Canada Gazette,* we feel that little resort will be held to the rights conferred by such a provision. Nevertheless, we believe that the right to inspect regulations should be statutorily guaranteed with as little qualification as possible. A statement should be inserted at the beginning of Part II of each number of the *Canada Gazette* to the effect that even unpublished regulations may be examined and copies obtained at the Office of the Clerk of the Privy Council.

Your Committee therefore recommends that all regulations, regardless of the regulation-making authority, should be available for public inspection.

2. *The Effect of Publication on the Commencement of Operation of Regulations*

As the law now stands, the general rule is that regulations become effective when made (See Chapter 5 above). Section 6 (1) of the *Regulations Act* requires that every regulation shall be published in English and in French in the *Canada Gazette* within thirty days after it is made. This, again, is the general rule. Individual statutes often require regulations to be published at times earlier than 30 days. See, for example, the *Army Benevolent Fund Act,* section 12 ("when made"); the *Broadcasting Act,* section 27(2) ("forthwith"); the *Central Mortgage and Housing Act,* section 11(4) ("upon becoming effective"); the *Export Credits Insurance Act,* section 12(2) ("upon becoming effective"); and the *Extradition Act,* section 7 ("as soon as possible"). Some statutes specifically provide that a regulation shall not have effect until it is published: the *Canadian Forces Act,* section 195 (2); the *Estate Tax Act,* section 52(2) and the *Income Tax Act,* section 117(2) (although both these statutes make provision for the retroactive operation of regulations); the *Hamilton Harbour Commissioners Act,* section 20(2); the *Immigration Appeal Board Act,* section 8(2); and the *Public Service Staff Relations Board Act,* section 19(2). Thus, the general position is that regulations are in effect for up to thirty days before they are published, except where individual statutes or regulations provide otherwise. A further exception can be found in section 6(3) of the *Regulations Act* which reads:

> (3) No regulation is invalid by reason only that it was not published in the *Canada Gazette,* but no person shall be convicted for an offence consisting of a contravention of any regulation that was not published in the *Canada Gazette* unless:
> (*a*) the regulation was, pursuant to section 9, exempted from the operation of sub-section (1), or the regulation expressly provides that it shall operate according to its terms prior to publication in the *Canada Gazette,* and
> (*b*) it is proved that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public, or the persons likely to be affected by it, or of the person charged.

Having regard to the recommendations which we shall make respecting the principles bearing on the connection between publication and operation, we are of the opinion that this subsection, generally, provides adequate safeguards. However, we feel that it would be improved if clause (*b*) were amended by inserting "reasonable steps had been taken for the purpose of bringing the terms of the relevant provision in the regulation to the notice of the public" were inserted in the place of "reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public".

The safeguard afforded by section 6(3) would be buttressed if more enabling provisions provided that regulations made thereunder should not come into effect until publication or some stipulated period of time after publication. Further, even in the absence of such a provision in the enabling legislation, regulations themselves should, where possible, provide that they are not to come into effect until publication or some later point in time.

Your Committee put the following question to the departments and agencies of the Government:

> 3. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until:
> (*a*) published in the *Canada Gazette;* or
> (*b*) thirty days after publication in the *Canada Gazette.*

The answers to this question indicate conclusively that the effect of such requirements depends entirely on the nature of the regulation in question. Some regulations are of a benefit-conferring nature only. They can only benefit affected persons. The answers indicated that there would be no useful purpose delaying the operation of such regulations until they were published. Other regulations are required to be passed quickly in the interest of public health and safety. To require such regulations as these to be published before they become effective could well defeat the purpose of delegating the power to make such regulations in the first place. Some regulations, of their nature, have to become effective when made. It is useful to reproduce, by way of example, the answer of the Department of Finance to question 3:

> In some cases such as regulations dealing with matters of procedure under the guaranteed loan legislation, a statutory requirement that a regulation could not become law until published or until some time after publication would probably have no harmful effect other than to further delay the already time-consuming process of enacting subsidiary legislation. There are, however, certain areas where such delays could be harmful. The following are some examples:
> (i) Because of the nature of capital markets and the need for last minute decisions to tailor the Government's borrowing program to market conditions, it would not be possible, administratively, to wait until Orders in Council passed under Part IV of the Financial Administration Act authorizing borrowings had been published in the *Canada Gazette.* A day or so after such Orders are passed, the terms and conditions of new bond issues are made public. It is important at that stage to proceed expeditiously with the issue and there can be no suggestion that the terms and conditions of the issue could be changed.

(ii) The guaranteed loans legislation provide that interest rates are to be prescribed by regulations. It would seem essential that once an interest rate has been established, it should be applied immediately. Otherwise the lending institutions, knowing of a pending increase, would suspend further loans until the new rate became effective.

(iii) Another example relates to the imposition or removal of surtax under section 7 of the Customs Tariff. It would obviously be undesirable to have advance publicity of any such changes. The same difficulty is encountered with respect to any regulation changing excise, tariff or other rates.

(iv) In some areas of the Department's responsibilities the time factor may be critical where the regulations are made to remedy specific problems. For example, an Order exempting goods or classes of goods from the application of anti-dumping duty to meet contingencies or the application of an emergency surtax to deal with injurious imports.

(v) The above comments are also applicable with respect to the Government's financial relationship with the Crown corporations.

In the Committee's view, the decision as to whether or not a regulation is to become effective only on publication, or some time thereafter, should be left, as it now is, to the individual statutes. However, **your Committee recommends that statutes should resort more than they now do to the use of provisions stating that the regulations made thereunder, or under specified sections thereof, do not become effective until published or some specified period thereafter.** Even if it felt in some cases that this type of decision cannot be made when the statute is being prepared, careful consideration should be given to the question when the regulations are being drawn and the practice of inserting in the regulation that it is not to become effective until published, or some time thereafter, should be encouraged. This is now done in some regulations. The Department of Transport, Marine Regulations Branch, advised us, as part of its answer to question 3, that:

> The remaining 20 of our regulations cover such non-safety matters as pollution, registry, licencing and the imposition of fees for services rendered by the Department; and there would be no particular administrative difficulties arising out of delaying their effective date until publication in the *Canada Gazette* or even 30 days thereafter. Even now, such regulations are frequently given an effective date some weeks or months after enactment.

A good example of the type of regulation which should not become effective until some time after publication is afforded by the Patent Rules relating to the organization of the Patent Office and the procedures respecting applications for patents, etc. These rules were amended by P.C. 1969-1319, on Friday, June 27, 1969, which came into effect on that date. The amendments made substantial changes in the law. We were advised that, at the outset of the operation of these amendments, copies were not available for those affected by them. Some were advised by an official in the Patent Office that no copies would be available until the amendments were published in the *Canada Gazette* two or three weeks later. On being apprised of the situation, the Commissioner of Patents arranged for the mimeographing and distribution of copies to patent practitioners immediately, on an urgent basis. The amendments were eventually published in the *Canada Gazette*—on the 23rd day of July, 1969.

The commencement date for the operation of a regulation should be one of the stipulated subject matters for scrutiny by the proposed Standing Committee on Regulations. Each department should have valid reasons why a regulation does not contain a provision to the effect that it is not to become effective until publication or some time thereafter.

3. *Time within which Regulations are to be Published.*

It may be queried whether the thirty day period provided for in section 6(1) of the *Regulations Act* is not too long. As far as the mechanics of publishing a regulation are concerned, we were advised to the following effect: A regulation has to be submitted to the Queen's Printer at least the second Friday before the Wednesday of publication—i.e. 12 days prior to the publishing date. In exceptional cases a regulation may be received for printing in the *Canada Gazette* if it is furnished to the Queen's Printer on the morning of the second Monday, prior to the date of publication. The *Canada Gazette* is now published on the second and fourth Wednesday of each month. (See section 3(1) of the *Regulation made under the Regulations Act*). It would appear, therefore, that the soonest a regulation can be published is 12 days after making and that it is possible for a regulation to be published as long as 25 days after it is made, even if it is furnished to the Queen's Printer the day it is made. The only apparent solutions to the problem respecting shortening the time for publication appear to be (*a*) shortening the 12 day period required by the Queen's Printer and (*b*) requiring that the *Canada Gazette,* or at least Part II thereof, be published every week—even more often.

In some cases special editions of the *Canada Gazette* have been published on days other than every second Wednesday. See for example the *Canada Gazette* published on Friday, January 10, 1969, setting forth regulations made under the *Anti-Dumping Act*. This practice should be encouraged, where appropriate.

The Government's reply to question 17 of our questionnaire ("Is there any reason why regulations could not be published within fifteen days of being made?") was as follows:

> Regulations could be published within fifteen days provided all the necessary personnel and faciilties were available. This would involve considerable additional expense both to the Departments and Agencies involved and for the central Agencies. The current inhibiting factors are purely administrative.

If the expense is not prohibitive, we would encourage earlier publication of regulations.

4. *Consolidation and Indexing.*

Section 9(1) of the *Regulations Act* provides that the Governor in Council may make regulations providing for, *inter alia,* the publication of consolidations and the indexing of regulations.

Section 7 of the Regulation made under this provision provides:

> 7. A consolidation of all regulations then in force shall be published from time to time when determined by the Governor in Council.

Pursuant, apparently, to this power, P.C. 1955-539, SOR/55-138 was passed ordering that a consolidation of all regulations in force on January 1st, 1955, be published, the said consolidation to be entitled, *"Statutory Orders and Regulations, Consolidation, 1955"*. The regulations have not been consolidated since that time. Your Committee has been advised that the regulations now in force will be so consolidated again after a new issue of the Revised Statutes of Canada has been completed. This project is now under way.

Your Committee recommends that regulations should be consolidated (which involves, perforce, revising each regulation so that all of its amendments since its first enactment are incorporated in its text) **on a much more regular and frequent basis than has been the practice in the past, and at least once every five years.** Consolidation makes it much easier to find the law.

We would also refer to section 19 of the *Canada Grain Act* which provides:

> 19. The Board shall, during the month of August in each year, publish in the *Canada Gazette* in consolidated form all regulations made by the Board under this Act and in effect on the first day of that month.

This is a useful precedent which could be used in other statutes which provide for the making of regulations which are frequently amended. We suggest that more resort be had to such provisions in the statutes, where appropriate, that is where a regulation is subject to frequent amendment.

Section 8 of the Regulation made under the *Regulations Act* provides:

> 8. The Clerk of the Privy Council shall cause to be published quarterly a consolidated index and table of all regulations and amendments, revocations or other modifications made since the last preceding consolidation.

The quarterly consolidated index and table of statutory orders and regulations which is published pursuant to this regulation is a very useful document. Regulations are listed therein alphabetically according to their title, subject matter or title of the Act under which they are made. Further, this publication contains a table of statutory orders and regulations according to the enabling statutes under which they were made. This table enables one searching the law to satisfy himself that he has the titles and numbers of all regulations passed under any given statute (which are not exempted from the *Regulations Act*) up to the point in time covered by the table.

In keeping with our previous recommendation, **your Committee recommends that the present quarterly consolidated index and table of statutory orders and regulations should include reference to all regulations which have been exempted from publication,** according to their title (which should be as descriptive as possible), the Act under which they were made, their date, and the date of their transmittal.

Chapter 7

Laying of Regulations Before Parliament

Section 7 of the *Regulations Act* provides:

> 7. Every regulation shall be laid before Parliament within 15 days after it is published in the *Canada Gazette* [which should be within 30 days after it is made, s.6(1)] or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

This provision applies to all regulations covered by the *Regulations Act*. It may be noted, however, that approximately twenty-five other statutes of the Dominion of Canada provide for the laying before Parliament of regulations made thereunder. Some of them provide that the regulations made thereunder shall be laid "as soon as may be after they are made", "forthwith", "fifteen days after the making thereof", "as soon as possible" and "at the session next after the making thereof".

The subject of the laying of regulations before Parliament should be considered, to some extent, together with the scrutiny of regulations, Parliamentary action with regard thereto, and publication. All of these are considered in other parts of this Report. E. A. Driedger has observed that the purpose of Section 7 of the *Regulations Act* is twofold:

> To acquaint the public with the law, and to provide an opportunity for comment. Publicity and freedom of discussion are probably the best safeguards against the abuse of power. ("The Enactment and Publication of Canadian Administrative Regulations", 19 *Administrative Law Review* 129 at p. 134).

It is useful, in assessing whether or not the present laying procedure provided for in Section 7 has an practical value, to describe what in fact is involved when a regulation is laid.

A regulation is now laid when a member of the Privy Council tables Part of the *Canada Gazette* in the House. Reference in this respect may be made to Standing Order 41(1) of the House of Commons which provides:

> (1) Any return, report or other paper required to be laid before the House in accordance with any Act of Parliament or in pursuance of any resolution or standing order of this House may be deposited with Clerk of the House on any sitting day, and such return, report or other paper shall be deemed for all purposes to have been presented to or laid before the House.

Members may thereupon consult or obtain a copy in the Parliamentary Returns Office. (*Minutes of Proceedings and Evidence,* pp. 235-36). Standing Order 41(3) provides that a record of any regulations so laid "shall be entered in the *Votes and Proceedings* of the same day". It may be thought that *Votes and Procedings* brings regulations to the attention of members. This is not the case. Reference may be made, by way of a typical example, to *Votes and Proceedings* dated May 29, 1969 at p. 1085 where the following appears:

> *Returns and Reports Deposited with the Clerk of the House*
> The folowing papers having been deposited with the Clerk of the House were laid on the Table pursuant to Standing Order 41(1), namely: . . .
> by Mr. Macdonald, a Member of the Queen's Privy Council.—Copies of Statutory Orders and Regulations published in the *Canada Gazette,* Part II, of Wednesday, May 28, 1969, pursuant to Section 7 of the Regulations Act, chapter 235, R.S.C., 1952. (English and French).

Such a statement obviously does not inform the Members, in any respect, of the nature of the regulations laid.

There are other reasons why this procedure, as a matter of law, appears to be useless for bringing regulations to the attention of Members. The provisions of P.C. 1954-1787, the *Regulation made under the Regulations Act,* provides in Section 3(2) thereof as follows:

> (2) Copies of Part II [of the *Canada Gazette*] and of all consolidations of regulations shall be delivered to such persons as are entitled to receive copies of the Statutes of Canada, . . .

It appears from Section 10(3) of the *Publication of Statutes Act,* R.S.C. 1952, c.230 that the members of the two Houses of Parliament are to receive copies of the Statutes of Canada. The Queen's Printer has adopted the practice of distributing the statutes and Part II of the *Canada Gazette* "on written request only" according to a manual prepared for use by this agency. This requirement, insofar as it relates to Members of Parliament, does not appear in the *Publication of Statutes Act,* in Order in Council P.C. 1953-609 (April 27, 1953) as amended by P.C. 1953-1661 (October 28, 1953), which are said, in the manual, to contain "regulations governing the free distribution to authorized categories." Nor does it appear in P.C. 1955-538 which further amends P.C. 1953-609, but which is not mentioned in the manual.

Members of Parliament should receive Part II of the *Canada Gazette* automatically, as is contemplated by section 3(2) of P.C. 1954-1787. Premising such receipt, it would appear that the laying procedures contemplated by Section 7 of the *Regulations Act* would not be necessary (assuming *Votes and Proceedings* contained more particulars with respect to regulations laid), to inform Members of the existence of the regulations. Further, it is obvious that the present laying procedures do not in any way further publicize regulations, or their existence, beyond the publicity already given to them by their publication in the *Canada Gazette.*

As far as the legal effect of laying is concerned, it is of interest to note by way of contrast, the general position in the United Kingdom where regula-

tions must be laid before they come into force. See section 4(1) of the *Statutory Instruments Act,* 1946, quoted in Chapter 5.

It is fair to say that the present laying procedure provided for in Section 7 of the *Regulations Act* is an empty formality. In our opinion, there is constitutional value in the formal notification of Parliament of laws made pursuant to powers it has delegated to the executive and the administration. Apart from the convenience of being able to table regulations in their *Canada Gazette* form there appears to be no reason why a regulation should await a potential total of 45 (30 days for publication, then 15 days thereafter) days before it is laid before Parliament. **Your Committee recommends that all regulations should be laid before Parliament forthwith after their transmittal to the Clerk of the Privy Council and their recording and numbering by him.** Any delay in the laying of the regulation pursuant to such a provision should be subject matter for scrutiny by the proposed Standing Committee on Regulations and, where appropriate, report to the House. **Your Committee recommends that Votes and Proceedings should list under "Returns and Reports Deposited with the Clerk of the House" the title of each regulation (which should be as descriptive as possible), the Act under which it is made, its date and the date of its transmittal.**

When Parliament is not sitting, by reason of dissolution, prorogation or adjournment, the regulation should be laid forthwith upon the resumption of sitting of the Parliament. Alternatively, in cases of prorogation and adjournment, it could be provided that depositing a regulation with the Clerk of the House on *any day* (and not just a sitting day), should be deemed for all purposes to laying the regulation before the House. This would require an amendment to Standing Order 41(1).

We think that it would be advisable if the *Regulations Act* were amended to expressly empower each House to decide for itself what constitutes "laying". Such an amendment would have the effect of confirming the present practice. Reference may be made to the United Kingdom *Laying of Documents before Parliament* (*Interpretation*) *Act,* 1948, c. 59, which makes such a provision with respect to the United Kingdom Houses of Parliament and which was enacted "for removal of doubt".

Chapter 8

The Scrutiny of Regulations

1. *General.*

It seems obvious to us that, as a general principle, Parliament should be concerned with the nature and quality of laws made pursuant to powers which it has granted to the Governor in Council, to Ministers and to other persons and bodies. "The grant of general powers, however justified, implies a responsibility for close legislative attention to the course of administration". (Louis L. Jaffe, *Judicial Control of Administration Action*, (1965) at page 41). It is not possible for Parliament, as an institution, to keep directly under satisfactory review all subordinate legislation.

It is of value to review the institutional machinery which has been established by legislatures in other jurisdictions to deal with the review of this type of legislation. We should state, at this point, that the central problem relating to legislative review of executive and administrative law-making is the degree to which Parliament should involve itself in attempting to influence and control the course of administration. If Parliament goes too far into the substance of day-to-day administration it defeats many of the underlying reasons for delegating powers to make laws in the first place: lack of parliamentary time; lack of parliamentary knowledge on technical matters; the need to make rapid decisions in cases of emergency, etc.; (see Chapter 1). It is against this background that it is useful to examine, briefly, the experience of other jurisdictions.

2. *History of Parliamentary Scrutiny of Regulations.*

In England in 1925 the House of Lords, being concerned with the rather routine nature of the manner in which it was accustomed to approving, where required by statute, subordinate legislation, established a Special Orders Committee to examine regulations requiring an affirmative resolution before coming into effect and to report to the House thereon. As described by Dr. Kersell, the Committee considers these four matters:

(1) Whether the provisions raise important questions of policy or principle;
(2) How far the special order is founded on precedent;

(3) Whether the instrument can be passed by the House without special attention and whether there ought to be further special inquiry before the House proceeds to a decision, and if so, what form that inquiry might take;

(4) If the Committee has any doubt as to whether or not an instrument is *intra vires* it must report to the House accordingly. (*Parliamentary Supervision of Delegated Legislation* (1960) p. 29).

In 1931 the Senate of Commonwealth of Australia established a Standing Committee on Regulations and Ordinances to examine regulations to ascertain:

(1) that they are in accord with the statute;

(2) that they do not trespass unduly on personal rights and liberties;

(3) that they do not make rights and liberties of citizens dependent on administrative and not judicial decisions;

(4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for Parliamentary enactment.

It should perhaps, be noted that the Australian Senate is not an appointed, but an elected, body.

In 1932 in the United Kingdom the Committee on Ministers' Powers (the Donoughmore Committee), paying scant attention to the existing House of Lords Committee, made the following recommendations respecting scrutiny of regulations by both Houses:

XIV. Standing Orders of both Houses should require that a small Standing Committee should be set up in each House of Parliament at the beginning of each Session for the purpose of... considering and reporting on every regulation and rule made in the exercise of delegated legislative power, and laid before the House in pursuance of statutory requirement...

Every regulation or rule made by a Minister in the exercise of delegated lawmaking power, and laid before the House in pursuance of statutory requirement, would stand referred to the Committee. It would be the duty of the Committee to consider the regulation or rule forthwith, and to report to the House within fourteen clear days of the day on which the regulation or rule was laid. The Committee would not report on the merits of the regulation or rule but would report:

(1) whether any matter of principle was involved:

(2) whether the regulation or rule imposed a tax:

(3) whether the regulation or rule was

(*a*) permanently challengeable; or

(*b*) never challengeable, i.e., unchallengeable from the commencement; or

(*c*) challengeable for a specified period of time and thereafter unchallengeable and, if so, what was the specified period:

(4) whether it consisted wholly or partly of consolidation:

(5) whether there was any special feature of the regulation or rule meriting the attention of the House:

(6) whether there were any circumstances connected with the making of the regulation or rule meriting such attention:

(7) whether the regulation or rule should be starred, on the grounds that it was exceptional, and subjected to the procedure described below. (*Report,* pp 67-69).

These recommendations bore no immediate fruit. However, in 1944 the British House of Commons established a Select Committee on Statutory Rules and Orders. Its function is to consider subordinate legislation "with a

view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

(i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payments;

(ii) that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts either at all times or after the expiration of a specified period;

(iii) that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made;

(iv) that it purports to have retrospective effect where the parent Statute confers no express authority so to provide;

(v) that there appears to have been an unjustifiable delay in the publication or in the laying of it before Parliament;

(vi) that there appears to have been unjustifiable delay in sending a notification to Mr. Speaker under the proviso to subsection (1) of section 4 of the Statutory Instruments Act 1946, where an Instrument has come into operation before it has been laid before Parliament;

(vii) that for any special reason its form or purport calls for elucidation;

(viii) that the drafting of it appears to be defective;"

In South Africa in 1949 a Select Committee of the House of Assembly of the Parliament of the Union of South Africa recommended the appointment of "an officer" to examine regulations and report to the House thereon on any one of the following grounds:

(*a*) That they appear to make any unusual or unexpected use of the powers conferred by the statute under which they are framed.

(*b*) That they tend to usurp control of the House over expenditure and taxation.

(*c*) That they tend to exclude the jurisdiction of the courts of law without explicit enactment.

(*d*) That for any reason their form or purport calls for elucidation or special attention.

In 1953, in India the House of the People established a Committee on Subordinate legislation. The general function of this Committee is to scrutinize and report to the House "whether the powers to make regulations, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation." In scrutinizing regulations the Committee is to consider:

(1) whether the Order is in accord with the general object of the Constitution or the Act pursuant to which it is made;

(2) whether it contains matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;

(3) whether it contains imposition of any tax;

(4) whether it directly or indirectly bars the jurisdiction of the courts;

(5) whether it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

(6) whether it involves expenditure from the Consolidated Fund of India or the public revenue;

(7) whether it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

(8) whether there appears to have been unjustifiable delay in its publication or the laying of it before Parliament;

(9) whether for any reason its form and purport call for any elucidation.

In New Zealand Standing Order 360 of the House of Representatives provides:

360. Statutes Revision Committee—At the commencement of every session a Statutes Revision Committee shall be appointed to consider all Bills containing provisions of a technical legal character which may be referred to it; and to consider any regulation within the meaning of and published pursuant to the Regulations Act 1936 which may be referred to it, with a view to determining whether the special attention of the House should be drawn to the regulation on any of the following grounds:

(*a*) That it trespasses unduly on personal rights and liberties:

(*b*) That it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:

(*c*) That for any special reason its form or purport calls for elucidation:

The Committee to have power to sit during any adjournment or recess; to require any Government department concerned to submit a memorandum or to depute a witness for the purpose of explaining any regulation which may be under its consideration; and to report to the House or the Government from time to time.

In the Province of Manitoba in 1960 a Standing Committee on Statutory Orders and Regulations was established to examine regulations referred to it under the Act. This Committee applies the following principles in assessing regulations:

(*a*) The Regulations should not contain substantive legislation which should be enacted by the Legislature, but should be confined to administrative matters.

(*b*) The Regulations should be in strict accord with the statute conferring the power and unless so authorized by the statute, should not have any retroactive effect.

(*c*) The Regulations should not exclude the jurisdiction of the Courts.

(*d*) The Regulations should not impose a fine, imprisonment or other penalty or shift the onus of proof of innocence on to the person accused of an offense.

(*e*) A Regulation in respect of personal liberties should be strictly confined to things authorized by the statute.

In 1963 the Province of Saskatchewan established a system whereby the legislature appoints at the beginning of each session a Special Committee on Regulations. Its scrutiny criteria are:

(*a*) That it imposes a charge on the public revenues or prescribes a payment to be made to any public authority not specifically provided for by statute.

(*b*) That it is excluded from challenge in the courts;

(*c*) That it makes unusual or unexpected use of powers conferred by statute;

(*d*) That it purports to have retrospective effect where the parent statute confers no express authority so to provide;

(*e*) That it has been insufficiently promulgated;

(*f*) That it is not clear in meaning.

It is of interest to review the highlights of Canadian Parliamentary history respecting legislative review of regulations. In 1943, in a speech in the Throne Speech Debate, the Honourable Brooke Claxton stated (*Debates* 1943, Vol. I, p. 297) that

. . . the "practice of tabling orders in council, is, for all practical purposes, an empty form. I suggest that orders in council be referred to a committee for con-

sideration—not all the orders but orders having the effect of legislation of a general nature. Even when they get to the committee, all the orders of that kind would not be discussed; but if the committee felt that one particular matter should be discussed it could take up that order, have the departmental officials there to explain it, and make its report to the House. This could be done exceedingly quickly. In this way there would be an opportunity of improving the drafting of the orders, which sometimes leaves a great deal to be desired; there would be exercise of control over the executive, opportunity for ventilating grievances, and also observance of the important principle of the supremacy of Parliament."

In 1950, when the present *Regulations Act* was passing through Parliament, the Prime Minister observed (*Debates*, 1950, Vol. III, p. 3040):

> We do not believe we should recommend at this time that sort of committee because most of the statutory regulations have to be made by the governor in council, and that gives considerable time for checking, whilst in the United Kingdom most of these things are done by boards or other agencies of the crown. No one who is responsible to parliament or to the public hears of these regulations until they have become law. This United Kingdom Committee has strictly limited terms of reference that probably would not fit our situation. They have to report on whether or not the order infringes seven stated principles. If it does not, the committee has nothing to do with it. If it does, they call attention to that fact. We do not believe that would be a remedy that would fit our situation.

This statement implies that it was the view of the Government at that time that legislative scrutiny and executive scrutiny would, in fact, fulfill the same basic function.

In 1964 the Special Committee on Procedure and Organization of the House of Commons issued its Fifteenth Report (paragraphs 10 and 12 tabled in the House on December 15, 1964) which read, in part:

> 12. Your Committee recommends the establishment of the following six Standing Committees, described for the purposes of this Report as other Standing Committees, with the functions described below: . . .
>
> (*e*) *Standing Committee on Delegated Legislation*
>
> The function of this committee would be to act as a "watchdog" over the executive in its use of the powers conferred by statute, with the duty of reporting to Parliament any tendency on the part of the executive to exceed its authority. The committee's terms of reference should exclude it from considering the merits of or the policy behind delegated legislation, but it would be expected to draw the attention of Parliament to any regulations or instruments which impose a charge in public revenues, which confer immunity from challenge in the courts, which have an unauthorized retroactive effect which reveal an unusual or unexpected use of a statutory power, or which otherwise exceed the authority delegated by the parent statute.

The *Ontario Royal Commission Inquiry into Civil Rights Report*, 1968 at page 378, recommended the appointment of a legislative committee to scrutinize regulation having regard to these principles:

(*a*) They should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.

(*b*) They should be in strict accord with the statute conferring the power, particularly concerning personal liberties.

(*c*) They should be expressed in precise and unambiguous language.

(*d*) They should not have retrospective effect unless clearly authorized by statute.

(*e*) They should not exclude the jurisdiction of the courts.

(*f*) They should not impose a fine, imprisonment, or other penalty.

(*g*) They should not shift the onus of proof of innocence to a person accused of an offence.

(*h*) They should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like).

(*i*) They should not make any unusual or unexpected use of delegated power.

(*j*) General powers should not be exercised to establish a judicial tribunal or administrative tribunal.

The Report stressed at page 377:

> The terms of reference for the Committee should exclude from review any consideration of the policy of the parent Act or of the merits of the regulations. The policy of the Act, having been settled by the Legislature after full debate and discussion, ought not to be re-opened for discussion in the Committee. The merits of the regulations, i.e., an evaluation of the need for them and their efficacy within the framework of the policy approved and provided for by the Act, are matters for which the government is responsible to the Legislature. It is not proposed that the functions of the Committee should be to supervise the operations of departments of government. Elimination of the consideration of policy or merits should permit the Committee to proceed in a non-partisan way as it has done in the United Kingdom and Manitoba.

Following this recommendation the Ontario Government has introduced Bill 125 into the Legislature. At the time of writing, it has had two readings, April 17, 1969 and May 2, 1969. It reads in part:

R.S.O. 1969, c. 349, amended — 1. The *Regulations Act* is amended by adding thereto the following section:

Special Committee on Regulations — 12. (1) At the commencement of each Legislature, a special committee of the Assembly shall be appointed for the duration of the Legislature, to be known as the *Special Committee on Regulations, with authority to sit throughout each session of the Assembly*.

Regulations referred — (2) Every regulation stands permanently referred to the Special Committee on Regulations for the purposes of subsection 3.

Terms of reference — (3) The Special Committee on Regulations shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling statutes, and shall deal with such other matters as are referred to it from time to time by the Assembly.

Authority to call persons — (4) The Special Committee on Regulations may examine any member of the Executive Council or any public servant designated by him respecting any regulation made under an Act that is under his administration.

Report — (5) The Special Committee on Regulations shall, from time to time, report to the Assembly its observations, opinions and recommendations.

3. *Functioning of a Scrutiny Committee.*

The function of the United Kingdom House of Commons Scrutiny Committee has been thus described by one of its chairmen:

> If Members of Parliament were all perfect and able to do an inestimable amount of work, they would read all [the statutory instruments] through themselves and, if they desired, they could put down a prayer against any particular one but to save them doing that, this Committee is set up. Our function is to go through them and report to the House for their action if we think there is anything

unexpected or any unjustifiable delay or something that calls for elucidation. (*Minutes of Proceedings for Third Report of Select Committee on Procedure* (H.C. 189-1 of 1946) Para. 4704 (Sir Charles MacAndrew). Quoted on p. 93 of Griffith & Street, *Principles of Administrative Law* (3rd ed., 1963).

All the scrutiny committees have the following features in common: they are relatively small committees; they rely heavily upon preliminary examinations and reports of their legal counsel; they are more concerned with the form, language, and operation of regulations than their substance; they are objective and non-partisan; and they report the results of their examinations to the Legislature. The action which may be taken by the Legislature with respect to a regulation depends upon the terms of the applicable statutes and Standing Orders.

Most of the available literature relates to the British House of Commons Committee. We quote the following observations with respect to its work:

> To sum up: the amount of work, most of it drudgery, which is done by the Committee with the assistance of Counsel to the Speaker is considerable. The value and importance of this work are undeniable. The very existence of the Committee must prevent more shortcomings than the Committee detects; unjustifiable delay in publication and laying before Parliament has almost ceased; statutory instruments have became more intelligible. (Griffith & Street, *Principles of Administrative Law,* (3rd ed., 1963) at p. 99).
>
> Since [1944] it [the Select Committee on Statutory Instruments] has been in continuous existence and has done valuable work contrary to a good deal of expert and official opinion to the effect that its tasks were impracticable, undesirable, and so forth. (H.W.R. Wade, *Administrative Law* (2nd ed., 1967) at p. 319).
>
> Although sharply restricted in its terms of reference, the [Select Committee on Statutory Instruments] has had a considerable measure of success in inspiring legislation which tidied up the process of delegation reducing sharply objectionable uses of the device, arousing an informed public opinion, and even in curbing the verbosity of the framers of delegated legislation. The government departments are more careful in their later framing of new delegated legislation after the Committee has chided them . . . The civil servants fear it, and Cabinet respects it. (J. A. Corry, "The Prospects for the Rule of Law," Hodgetts and Corbett ed. "*Canadian Public Administration.*" (MacMillan Company, 1960) pages 547-48). Further the Committee on its own has achieved great improvements in the performance of departments with regard to lucidity in drafting and with regard to use of powers. Its very existence has had a salutory effect in these important matters. Delay in publication, laying and notification has been virtually eliminated for the past six years. No other serious abuses have really required the attention of the House. (John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) at p. 60).

4. *A New Standing Committee on Regulations.*

We should comment, at this point, on the adequacy of the existing form and draftsmanship scrutiny being conducted by the Privy Council Office, described in Chapter 4. Within the scope of its defined purposes this scrutiny fulfills a useful role and we have not hesitated to recommend its continuance. Its significant feature is that it is executive review of executive law-making. As such it is not, in our view, a substitute for legislative review of executive law-making.

On the basis of the evidence which we have heard and the submissions which we have examined, we are firmly of the view that: (a) Parliament has

a particular role to play in the examination of certain aspects of the regulation-making process and (b) this role requires the instrumentality of a Committee, the chief function of which would be to isolate for the attention of the House matters pertaining to regulations which relate to the criteria which we set forth further on in this Chapter.

Your Committee therefore recommends that a new Committee on Regulations (hereinafter called the Scrutiny Committee) **should be established** with the following particulars:

(1) It should be a Standing Committee of the House of Commons.

As we have seen, the first scrutiny committee established in the Commonwealth was the Special Orders Committee of the House of Lords, which came into being in 1925, and the comparable House of Commons committee, the Select Committee on Statutory Rules and Orders, was not established until 1944. In November, 1952, Viscount Stansgate suggested that a joint committee of both Houses should be set up to examine delegated legislation. However, the fact that the scope of review has always been different in the two Houses apparently made this proposal politically unacceptable.

Sir Cecil Carr suggests a further reason for two committees:

> Why, it may be asked, cannot the two Houses set up a Joint Committee instead of having two separate committees working independently? Well, we must not expect British institutions to operate on rigidly logical lines. In the past a Joint Committee has not been enthusiastically favoured by the Commons House, and anyhow a First and Second Chamber will have a different approach. In 1950 the affirmative resolution for approving a draft Order in Council affording immunities and privileges to the Universal Postal Union sailed serenely through the Commons but ran into heavy weather in the Lords, where the Government withdrew it, the Commons then having meekly to cancel the approval they had given. Maybe Second Chambers are better equipped for sifting and reporting: our House of Lords has plenty of members with executive experience; the peers are 'less encumbered with the pressing distractions of everyday work' and are 'less dedicated to party allegiance'; their service can contribute the element of continuity. Two sieves must be better than one. ("Parliamentary Control of Delegated Legislation", *Public Law,* 1956, p. 200 at pp. 210-211).

In Australia the only scrutiny committee, the Standing Committee on Regulations and Ordinances, was set up by the Senate in 1931. Dr. Kersell analyzes the advantages of Upper-House scrutiny as follows:

> It would appear ... from a comparison of the Australian Senate Committee and the British House of Commons Committee that, useful as the House Committee is, an upper chamber Committee enjoys a number of significant advantages, even over a joint committee, which make it more effective. Undoubtedly the most important of these advantages is that its actions and utterances do not threaten the stability of the Government. Thus the Committee can be left free to scrutinize instruments on broad terms of reference, initially, perhaps, of its own choosing, which do not exclude substantive matters. Its reports, even when highly critical of the substance of delegated legislation, are likely to be considered on their merits and not on party lines. The Australian Government has on at least four major occasions found it possible to meet the criticisms of the Senate Committee by making appropriate concessions rather than by 'stone-walling' for a time before quietly implementing necessary changes.
>
> A second chamber and its committees, in addition, are not as squeezed by clock or calendar as are a lower house and its committees. They are not as distracted by the urgencies of political and governmental problems. Their memberships include, in each of Britain, Australia and Canada at least, a generous proportion

> of able men some of whom have had long executive and administrative experience. Particularly in Britain and Canada, but in Australia to a considerable degree, there is in second chamber committees the valuable element of continuity which is often difficult to maintain in the complexion of House Committees...
>
> The question now arises, could a committee of the Canadian Senate be as effective as that of the Australian, for the Australian Senate is elective, the Canadian is appointive. The Canadian Senate is understandably a much more reserved chamber than its Australian counterpart, but it does not necessarily follow that reports of a Canadian scrutiny committee made up of Senators would be ineffective. Much would depend on the quality of reports which in turn would depend on the quality of the Senators serving on the Committee and on the ability of the Committee's adviser or advisers. The Canadian Senate has in the past established committees of outstanding merit and there is no reason to believe it will cease to be able to do so in the future. If a Senate Scrutiny committee could produce reports of quality similar to reports from other Canadian Senate committees and to reports from the Australian Regulations Committee, they would carry much of their own conviction. This might be enhanced by making reports from a scrutiny committee easily available not only to Senators but also to M.P.s... (*Parliamentary Supervision of Delegated Legislation* (1960), pp. 76-79).

In India the scrutiny committee is of the Lower House, which is also necessarily the case in New Zealand where there is only the one House. The McRuer Commission recommendations are intended for a unicameral legislature and so provided no assistance on this point.

The Committe was divided over the question of the desirability of a Joint Committee of both Houses as opposed to a Standing Committee of the House of Commons alone, as some members felt that the non-elective and non-representative character of the Senate made it unsuitable for this role; but in the light of its terms of reference, which required it "to report on procedures for the review *by this House* of instruments made in virtue of any statute of the Parliament of Canada" (emphasis added), we have decided that we must in any event limit our recommendation in this respect to the setting up of a House of Commons committee. We therefore recommend the establishment of a new Standing Committee of the House of Commons charged with the scrutiny of regulations.

We should also state that we gave serious consideration to the scrutiny of regulations by the existing standing committees of the House—each committee examining regulations within its particular field of competence. Such committees would, of course, be much better suited to reviewing the policy content of regulations than would a specialized committee concerned chiefly with the processes respecting the exercise of delegated legislative powers. We came to the conclusion, however, that the continuous and sustained examination of regulations necessitates the establishment of a new Standing Committee on Regulations. We shall deal later with the substantial role which we believe Standing Committees should play with respect to the substantive aspects of regulations.

(2) All regulations should stand permanently referred to it.

The *Regulations Act* should provide that all regulations, as defined in that Act, including existing regulations should stand permanently referred to the Scrutiny Committe. This is the basic rule in Australia, Saskatchewan and

Manitoba and it may be noted that Ontario Bill 125 makes a similar provision. Specifically, each regulation should stand referred to the Scrutiny Committee forthwith upon its transmittal to the Clerk of the Privy Council. Such a rule enables the Committee to scrutinize the same regulations more than once, if it should so desire. It should be noted that under your Committee's proposed definition of "regulation", the Committe will have a broad subject matter: departmental directives, orders in council which add to or delete from statutory schedules, prerogative orders in council, regulations by independent agencies, regulations which are exempt from publication, as well as standard instances of regulatory power, provided always that they are exercises of legislative power.

(3) It should strive to operate in an objective and non-partisan way.

The Scrutiny Committee should approach its work in as objective and non-partisan a manner as possible. This appears to be one of the most significant features of Scrutiny Committees in other jurisdictions and we shall elaborate its implications in the course of the Report.

(4) It should have a small membership to enable it to operate effectively.

The Scrutiny Committee should be composed of a minimum of seven members and a maximum of twelve. It may be noted that in the United Kingsdom the Scrutiny Committe of the House of Commons, which is much larger than the Canadian House, is composed of eleven members. The Committee itself should be empowered to decide what its quorum should be. Standing Order 65(6) now provides that a majority of the members of a Committe shall constitute a quorum. The English Committee has a quorum of three. It is important that the work of the Committee not be frustrated by the lack of a quorum.

(5) To make the objectivity of the Committee apparent, there should be some rotation among parties in the chairmanship.

The objectivity of the Committee should be made apparent in its selection of its chairman.

In the United Kingdom the House of Commons Committee has a tradition of appointing an opposition member as Chairman. In most other jurisdictions it appears that a government member is the chairman.

In India the Chairman of the scrutiny committee is appointed by the Speaker, but the Deputy Speaker, if he is a member, *ipso facto* becomes chairman. On one occasion, at least, the Chairman has been a member of the Opposition. See M. P. Jain, "Parliamentary Control of Delegated Legislation in India", (1964) *Public Law* 3 and 152, at pp. 172-175.

It has been suggested that the British practice recognizes the theory that "as the Committee scrutinizes the handiwork of the government departments, a member of the ruling party may feel embarrassed in the Chair due to his conflicting loyalties" (Jain, *supra,* at p. 172).

On the other hand, Dr. Kersell gives the following evidence in favour of having a government member as Chairman:

> ... The advantage of having a senior member of the government's own party as chairman, I think, would be in the same terms as Senator Wood told me, that he

would have much readier access to any minister or to the minister chiefly responsible for an Order in Council in the Cabinet. If there was something that needed tightening up in an instrument, it would be more easily possible for him to get this done informally. I am convinced that it is better to do things informally, if at all possible, than to have a "knock 'em down, drag 'en out" fight in public. (*Minutes of Proceedings and Evidence*, p. 90).

It should be observed that this suggestion was made in the context of a submission that a majority of the members on the Committee should be from the Opposition.

We do not think that any binding rule should be laid down on this point but would hope that a tradition would develop which would allow some alternation in the chairmanship between government and opposition members.

(6) It should normally sit in public session.

The Scrutiny Committee should normally meet in public, but have the power to sit *in camera* where necessary. The British Committee does not meet in public, but it appears from information furnished to one of our members that some members of the present British Committee feel that it might be advisable to have some public meetings. In Manitoba and Saskatchewan the general rule is that the Scrutiny Committee meets in public. We feel that while public meetings might, in some cases, impinge upon the objective nature of the Committee's approach, the paramount interest is the openness of the legislative process. It should be remembered that the Scrutiny Committee is dealing with regulations which have become law and are part of the "public domain".

(7) It should be empowered to sit while Parliament is not sitting.

The Scrutiny Committee should be empowered to sit during vacations and, if possible, during prorogations of the House. This is provided for in Saskatchewan and Manitoba, but not in England. The work of the regulation-making authorities goes on all year and work of the Scrutiny Committee would be seriously hampered if it did not have the power to sit during prorogations of the House.

Beauchesne states that committees cannot be empowered to sit after prorogation (*Parliamentary Rules and Forms* 4th ed., 1958, p. 243). We are not convinced that this is sound parliamentary law, and we should like to deal with this point further in a later report.

(8) It should have adequate staff.

The Scrutiny Committee should be provided with adequate staff, including, in particular, counsel with appropriate legislative experience. In other jurisdictions which have scrutiny committees, the importance of the work of counsel is repeatedly stressed. Counsel should examine all regulations referred to the Committee, prepare reports thereon for the Committee, communicate with the various government departments and agencies on behalf of the Committee and assist the Committee in the preparation of its agenda. To emphasize his or their, as the case may be, objectivity, counsel should be appointed by Mr. Speaker, after consultation with the Committee, and not by the Government.

(9) It should examine regulations on the basis of six criteria.

The most important single question respecting the terms of reference of the Scrutiny Committee is whether or not it should be empowered to examine into and report upon matters of "policy". The avowed position in other jurisdictions having scrutiny committees is that such committees do not consider the policy or merits of a regulation—but only certain aspects which may loosely be referred to as matters of form relating to the *application* of policy. It is said that the avoidance of policy in the scrutiny of regulations results in a more objective and business-like review of regulations and enables the Committee to get through all of the regulations referred to it within a reasonable time after the referral thereof; if committees were to consider form *and* policy they would become hopelessly bogged down.

After some consideration, we have concluded that these observations are valid and we would recommend that the main thrust of the Scrutiny Committee's work should be with respect to certain criteria which would exclude policy matters from direct consideration. While it is difficult to define "policy", we understand it generally to mean something which relates directly to the substantive solutions embodied in regulations as a result of the content and purpose of the enabling statutes. Certainly that policy in a regulation which is a direct reflection of the guides set forth in the enabling legislation should not be debated by the Scrutiny Committee, since this would amount to a re-consideration of the statute itself. Also, since one of the chief purposes of conferring the power to make regulations is to enable the Administration, which is supposed to have certain first-hand expertise, to devise solutions to problems as they arise, it could strike at the root of this purpose if the Scrutiny Committee had a general power to second-guess the Administration.

Having come to this general conclusion with respect to matters of policy, we do not, by any means, wish to state that there is no proper scope for Parliamentary review of the policy content of regulations. Obviously there is. In our view, for the reasons given above and also, more significantly, because the Scrutiny Committee would lack the necessary substantive expertise, such review could not properly be carried out by it. Policy review should be conducted by the appropriate Standing Committee of the House, and the Scrutiny Committee should be empowered to refer questions of policy in regulations to them. We would hope and expect that the Scrutiny Committee would gradually develop an expertise in the expeditious handling of policy matters beyond its terms of reference.

In order to determine the proper scrutiny criteria, we have considered the various criteria used in other jurisdictions. It may be noted that our recommended criteria do not contain as many points as those in some jurisdictions. We would expect that the members of the Scrutiny Committee would adopt a common-sense approach to the standards to be applied, within the general framework of a non-policy approach, and it seems to us that there would be no advantage in a proliferation of scrutiny items,

such as has led to an over-lapping of criteria in some other jurisdictions (and we readily admit that there are some in our proposed list). Also many of the points covered in other jurisdictions appear to be questions relating to the terms of the statutory authority to make the regulation in question.

The Standing Committee on Regulations should therefore consider regulations referred to it with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds, which should be set out in the Standing Orders:

(a) Whether they are authorized by the terms of the enabling statute.

We recognize that the courts have the ultimate power to decide upon the legal validity of regulations, and that this criterion must not in any way interfere with judicial review. However, there are logical reasons why at the outset of the life of a regulation Parliament should review it to satisfy itself that is within the scope of the power granted. Private litigants should not have the sole responsibility for challenging unauthorized regulations.

(b) Whether they make some unusual or unexpected use of the powers conferred by the statute under which it was made.

It is obvious that this criterion would allow, to a certain degree, an examination of the policy contents of a regulation. It envisages that while a particular regulation may, from a logical point of view, be within the language of the enabling provision, it may nevertheless, from a practical point of view, contain a policy which is generally felt not to have been intended when the enabling statute was passed.

It may be observed that this is the most commonly used criterion in the United Kingdom. See John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960), page 170. See also M. P. Jain, "Parliamentary Control of Delegated Legislation in India", (1964) *Public Law* 152 at p. 152:

> Under this provision [unusual or unexpected use of rule-making powers], however, the Committee comes nearest to consideration and scrutiny of policy and merits of the rules, and this is regarded as the better way to approach the scrutiny of policy. This ingenious formula has been found to be quite useful in England; it has been used to catch cases of ultra vires, sub-delegation, cases of commission or omission by a department which, had it occurred in a Bill, would certainly have been pounced upon by the common sense of members of Parliament.

(c) Whether they trespass unduly on personal rights and liberties.

The basic idea behind this criterion is that, if personal rights and liberties are to be encroached upon, then this should be by statute and not by subordinate legislation. This criterion should be considered with (*b*) above, because it may be that the enabling legislation will expressly authorize regulations to be made which will, or may trespass unduly on personal rights and liberties. This, however, is particularly a matter to be taken into account when the statute is being framed and as to which reference should be made to Chapter 2 of this Report.

(d) Whether they have complied with the provisions of the Regulations Act with respect to transmittal, certification, recording, numbering, publication or laying before Parliament.

It may be noted that the general position is that non-compliance with these provisions in the *Regulations Act* does not result in the invalidity of a regulation. We have recommended that the operational effect of a regulation depend upon compliance with transmittal or publication requirements, depending on the nature of the regulation. We think that there is no useful purpose in treating a regulation as void for non-compliance with the Act. Such non-compliance would be kept to a minimum if it were the subject matter for scrutiny and report.

(e) Whether they (i) represent an abuse of the power to provide that they shall come into force before they are transmitted to the Clerk of the Privy Council or (ii) unjustifiably fail to provide that they shall not come into force until published or until some later date.

The explanation for this criterion can be found in Chapters 4 and 6 of this Report.

(f) Whether for any special reason their form or purport calls for elucidation.

This is a further useful catch-all criterion which would be particularly relevant in the cases where the Committee is unable to obtain a satisfactory explanation of a regulation from the Department concerned.

(10) It should have the usual investigative powers of a Standing Committee.

The Committee should have the usual powers of Standing Committees to call for persons, papers and records. It should, further, have the power to request from regulation-making authorities memoranda supporting, explaining or otherwise clarifying regulations.

(11) It should have the same power as other Standing Committees to report to the House.

The Scrutiny Committee should have the same power as other committees to report to the House. Its reports should cover not only individual regulations scrutinized by it but also, from time to time, the regulation-making process generally—with an emphasis on constructive criticism. This type of report has been a useful feature of the British House of Commons Scrutiny Committee. See John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) at pages 56-58. We would suggest that the reports of this Scrutiny Committee on regulations examined by it either draw the attention of the House to the regulations, where necessary, with some expression of opinion on them. The nature of the report is for the Committee to decide at the appropriate time, but will obviously be limited by the powers of the House itself, which we shall take up in the next Chapter.

We are of the opinion that no report adverse to a regulation should be made to the House unless the attention of the regulation-making authority has been drawn to the Committee's criticism and the authority has been given an opportunity to either explain, amend or withdraw the regulation, as the case may be.

5. *Policy Scrutiny.*

We have suggested that policy scrutiny is more appropriate for substantive Standing Committees than for the Scrutiny Committee. **Your Committee therefore recommends that the Scrutiny Committee should have the power, in its discretion, to refer regulations to other Standing Committees and that they should then stand referred to such committees for consideration.** This would require an amendment to the Standing Orders. Such a provision should not stand in the way of other means whereby Standing Committees could consider the policy contents of regulations. It is your Committee's view that the review of significant subordinate legislation by Standing Committees is one of the most important means of exercising parliamentary scrutiny and control. Such review would be exercized by appropriate committees whose members can be assumed to have acquired expert knowledge on the subject matter of the legislation in question.

Chapter 9

Parliamentary Action Respecting Regulations

The matter of the various control procedures which Parliament may give itself over regulations is interrelated with issues respecting laying procedures and, much more importantly, with the procedures and institutions established by Parliament for the scrutiny of regulations, both of which we have considered.

In existing Canadian law there are relatively few statutory provisions empowering Parliament to affect, by way of annulment or affirmative resolution, the operation of a regulation. We shall refer to these. In the United Kingdom, Parliament has reserved to itself much more power over subordinate legislation. It has adopted the following variety of legislative controls: requiring a regulation to be laid before Parliament and made subject to annulment within 40 days; requiring a regulation to be laid and made subject to an affirmative resolution before it becomes effective; requiring a regulation to be laid in draft and made subject to an affirmative resolution to bring it into force; requiring a regulation to be laid in draft and made subject to annulment within 40 days; and, merely requiring a regulation to be laid before becoming operative. The negative resolution procedure is the most common.

In the Province of Saskatchewan the *Regulations Act,* R.S.S. 1965, ch. 420, s. 17, provides:

> 17. Where under the Standing Orders of the Legislative Assembly or in accordance with the procedure otherwise prescribed by the Legislative Assembly, a member of the Executive Council or other authority making a regulation, or, in the case of a regulation made by order in council, the member of the Executive Council recommending it, receives from the Clerk of the Legislative Assembly a copy of a resolution of the assembly showing that the assembly disapproves the regulation or any part thereof, or requires it to be amended, the member of the Executive Council or other authority or the Lieutenant Governor in Council, as the case may require, shall revoke the resolution in whole or in part or amend it as required by the resolution.

A virtually identical provision may be found in section 12 of the Manitoba *Regulations Act,* R.S.M. 1954, ch. 224.

It may be noted that these provincial rules subject *all* regulations, indiscriminately, to revocation or amendment, as the occasion may require. It is

of interest to note that Ontario Bill 125 (first reading, April 17th, 1969, second reading, May 2nd, 1969) which makes provision for appointment of a Special Committee on Regulations to scrutinize regulations referred to it, makes no provision for any type of legislative action respecting the operation of a regulation.

Returning to legislation of the Parliament of Canada respecting parliamentary action over regulations, we feel that it is of value to set forth verbatim provisions from eleven statutes which portray the variety of restrictive techniques which Parliament has seen fit to provide for, from time to time. Amongst other comparisons and contrasts which may be made respecting these provisions, it is of interest to note those which require the action of both Houses of Parliament and those which require the action of one only, and also to note those which guarantee a debate on a motion to annul a regulation:

The *Admiralty Act,* R.S.C. 1952, ch. 1, s. 31(4):

> Copies of all rules and orders made under this section shall be laid before both Houses of Parliament within ten days after the opening of the session next after the making thereof, and at any time within thirty days after they have been laid before Parliament they or any of them may, by joint resolution of both Houses of Parliament, be suspended or repealed, in which event during suspension or after repeal no suspended or repealed rule or order has any force or effect.

The *Defence Production Act,* R.S.C. 1952, ch. 62, s. 41(2):

> Where a regulation has been laid before Parliament pursuant to subsection (1), a Notice of Motion in either House signed by ten members thereof, and made in accordance with the rules of that House within seven days of the date the regulation was laid before that House, praying that the regulation be revoked or amended, shall be debated in that House at the first convenient oportunity within the four sitting days next after the day the motion in that House was made.

The *Exchequer Court Act,* R.S.C. 1952, ch. 98, s. 88(3):

> All such rules and orders and every portion of the same not inconsistent with the express provisions of any Act shall have and continue to have force and effect as if herein enacted, unless during such session an address of either the Senate or House of Commons is passed for the repeal of the same or any portion thereof, in which case the same or such portion shall be and become repealed; but the Governor in Council may, by proclamation, published in the *Canada Gazette* or either House of Parliament may, by any resolution passed at any time within thirty days after such rules and orders have been laid before Parliament, suspend any rule or order made under this Act; and such rule or order shall thereupon cease to have force and effect until the end of the then next session of Parliament.

The Maintenance of railway Operation Act, 1966, S.C. 1966-67, ch. 50, s. 11:

> (1) A regulation under Section 10 establishing a board of arbitrators shall be laid before the House of Commons not later than five days after the day the regulation is made or, if that House is not then sitting, within the first five days next thereafter that the House of Commons is sitting and the regulation becomes effective on the tenth sitting day of Parliament after the day the regulation is laid before the House of Commons unless the regulation is before that date revoked pursuant to subsection (2).
>
> (2) Where a regulation under Section 10 establishing a board of arbitrators has been laid before the House of Commons, a notice of motion in that House praying that the regulation be revoked, signed by ten members thereof, and made in

accordance with the rules of that House within five days of the day the regulation was laid before it shall be debated in that House at the first convenient opportunity within the three sitting days after the motion was made in that House; and if that House resolves that the regulation be revoked, the regulation is thereupon revoked and is of no force or effect.

The *Maritime Transportation Union's Trustees Act,* S.C. 1963, ch. 17, s. 24:

(1) This Act expires on the 31st day of December, 1966 unless before that date this Act is extended to a later date which may be fixed by proclamation of the Governor in Council.

(2) A proclamation under subsection (1) shall be laid before Parliament not later than 15 days after its issue, or, if Parliament is not then sitting, within the first 15 days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked shall be debated in that House at the first convenient oportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect and this Act shall cease to be in force but without prejudice to the previous operation of this Act or anything duly done or suffered thereunder or any offence committed or any punishment incurred.

The *National Energy Board Act,* S.C. 1959, ch. 46, s. 87(4):

A proclamation issued under this section shall be laid before both Houses of Parliament as soon as may be after it is issued, and a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within seven days of the day the proclamation was laid before that House, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made; and if both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect and the provisions of this Part shall thereupon cease to be applicable to oil.

The *United Nations Act,* R.S.C. 1952, ch. 275, s. 4:

Every order and regulation made under this Act shall be laid before the Parliament forthwith after it has been made if Parliament is then sitting, or if Parliament is not then sitting, forthwith after the commencement of the next ensuing session and if the Senate and the House of Commons within the period of forty days beginning with the day on which any such order or regulation is laid before Parliament and excluding any time during which Parliament is dissolved or prorogued or during which both the Senate and the House of Commons are adjourned for more than four days, resolve that it be annulled, it ceases to have effect, but without prejudice to its previous operation or anything duly done or suffered thereunder or any offence committed or any penalty or punishment incurred.

The *Export Act,* R.S.C. 1952, ch. 103, s. 5:

(2) Every regulation shall be laid before both Houses of Parliament within the first 15 days of the session next after the date thereof, and such regulation shall remain in force until the day immediately succeeding the date of prorogation of that session of Parliament and no longer unless during the session it is approved by resolution of both Houses of Parliament.

The *Customs Tariff Act,* R.S.C. 1952, ch. 60, s. 4(4):

(4) Where any order is made after the coming into force of this subsection under the authority of paragraph (*b*), (*d*) or (*f*) of subsection (1) [respecting the with-

drawal of tariff benefits] the order shall, subject to the provisions of this Act, cease to have any force or effect with respect to any period following the one hundred and eightieth day from the date of its making, unless not later than the one hundred and eightieth day from the date of its making the order is approved by Parliament; . . .

The *War Measures Act*, R.S.C. 1952, ch. 288, s. 6:

(1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred . . .

The *Atlantic Region Freight Assistance Act*, S.C. 1968-69, ch. 52, s. 5(4) and (5):

Where an order has been laid before Parliament pursuant to subsection (3), a notice of Motion in either House signed by ten members thereof and made in accordance with the rules of that House within fifteen days of the day the order was laid before Parliament, praying that the order be annulled, shall be debated in that House at the first convenient opportunity within the ten sitting days next after the day the motion in that House was made.

(5) If either House of Parliament resolves that the order be annulled, the order shall stand annulled and have no effect.

The foregoing provisions represent all of the provisions in federal legislation which we have been able to find respecting parliamentary power over the operation of a regulation. It will be noted that only the *Export Act* and the *Customs Tariff Act* require affirmative resolutions of Parliament and the other statutes provide for negative resolutions.

In this Committee's Questionnaire to Government Departments and Agencies the following questions were asked:

4. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until approved by an affirmative resolution of the House of Commons within thirty days of being laid before the House—assuming, for the purpose of your answer, that the regulation is laid within fifteen days of being published?

5. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that regulations made under legislation administered by your Department or Agency would become law when made but

would be subject to being annulled by a resolution of the House of Commons within forty days of being laid before the House—assuming them to be laid within fifteen days of being made?

With respect to question 4, relating to affirmative resolutions, most of the answers indicated that such a procedure would not be satisfactory because it would have the effect of delaying the operation of laws carrying out useful policies. Many of the answers pointed out that if the House was not sitting at the time the regulation was laid this would further delay the operation of the regulation and some answers said that a regulation could well lapse if time were not found in the House to pass the required affirmative resolution. Practically all of the answers were critical of the annulment procedure referred to in question 5—primarily on the ground that such a procedure would cause intolerable uncertainty as to the state of the law. Some answers indicated that for all practical purposes the regulation would not become operative until the time for its annulment had gone by.

We are of the view that there is, on balance, a significant value in some forms of parliamentary control over subordinate legislation. We regard the following observations as stating the obvious:

> If Parliament is accepted as the sole legislative authority, and if by force of circumstances it must delegate some of its authority to others, then it stands to reason that the public will expect the Parliament to exercise something more than a merely nominal supervision over the work of those to whom law-making powers have been delegated. (*Report of the Delegated Legislation Committee,* New Zealand (1962), page 6).
>
> It is a primary function of the Legislature to make the laws, and it is responsible for all laws it makes or authorizes to be made. A failure by the Legislature to find some specific place in the legislative calendar for supervision of subordinate legislation is, in our view, a dereliction of duty on its part and a failure to protect the fundamental civil rights of the individual. (*Report of the Royal Commission—Inquiry into Civil Rights,* 1968, page 370).

As far as "control" is concerned we would agree with the insight expressed in Bernard Crick's *Reform of Parliament* (1964) at page 76 ff:

> Thus the phrase 'Parliamentary control', and talk about the 'decline of Parliamentary control', should not mislead anyone into asking for a situation in which Governments can have their legislation changed or defeated, or their life terminated.

A distinguished American scholar with considerable experience in government work, the late Dean J. M. Landis, has commented on the advantages, generally, of the United Kingdom techniques of Parliamentary control over subordinate legislation, as follows:

> These techniques have several virtues for one thing, they bring the legislative into close and constant contact with the administrative. Objections by individual members of the legislature to particular regulatory measures can easily and openly be made. With us [the United States], individual legislators who object to the particular administrative regulations, place their objections before the administrative . . . By giving the legislative a definitely recognized share in the exercise of the regulatory power of the administrative, a much more open responsibility of the administrative to the legislature is obtained.
>
> Again, the English technique permits the administrative to call upon the legislature to assume some of the responsibility attendant upon action. The legislative thus can help to overcome a hesitancy to take responsibility for action that sometimes

makes the administrative process stagnant... It would be unwise, of course, to require the adoption of the English techniques in all cases. But when the anticipated administrative action is of large significance, value attaches to their employment... (*The Administrative Process, (1938)* pages 77-79).

We are of the view that the benefits of the English system, which has been resorted to infrequently in Canada, as indicated above, can be enjoyed without any substantial resort to provisions giving Parliament absolute control over the operation of a regulation. We would refer to the following observations which have been made on this issue by thoughtful students of the Parliamentary process and other responsible observers:

In practice instruments are never annulled, because the Minister can count on the Government's majority. Even if the Government were 'caught napping' the Minister could introduce another instrument in identical terms. The procedure by negative resolution was seldom used before 1943. Its value has been questioned, but it has in recent years led to interesting and important debates. No amendment of the instrument is possible, although as a result of criticism the Minister may withdraw it and submit another in a modified form. A better procedure might be to allow motions that a Statutory Instrument be referred to the Government for consideration. (O. Hood Phillips, *Constitutional and Administrative Law* (4th ed., 1967) at pages 579-80).

One common feature to all these procedures is that neither House has power to amend the statutory instrument. Although some feel that this should be possible, it might involve the House too closely in detailed consideration of matters which Parliament has already decided should be delegated to a Minister it might give rise to complications and delay if each House introduced different amendments. It seems better that if a House is not satisfied with an instrument as it stands, the Minister should withdraw it and start again. (Wade and Phillips, *Constitutional Law* (7th ed., 1965) at page 618). (This observation is relevant, in part, to the procedure obtaining in Manitoba and Saskatchewan where the Legislatures (which are unicameral) are empowered to require that regulations be amended).

Motions for consideration seem *a priori* to be a realistic technique for gaining some Parliamentary influence over subordinate legislation. British prayers for annulment and Australian motions for disallowance seem on the surface to give Parliament more effective powers of control, but as we have seen, such motions have little chance of success in doing more than can be done by the New Zealand counterpart—the motion for consideration.... In New Zealand Members of Parliament can, if they are disposed, put their views and objections regarding sub-legislation just as forcefully and just as effectively to the Minister, and through him to the departmental officials who, of course, in practice, administer and amend subordinate laws. (John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) at page 110).

Dr. Kersell in the period of time between the publication of his book and his submissions to this Committee had not changed his views. He advised as follows:

I am not in favour of the annulling procedure at all. I think it would be more meaningful and more realistic to have a procedure whereby instruments would be referred to the government for consideration, as is the term in New Zealand. You are not telling the government that it cannot have this regulation. It is going to put the whips on it and acquire it in any case. That is referring to experience. (*Minutes of Proceedings and Evidence,* page 96).

The Hon. James C. McRuer has expressed similar views:

If all regulations were required to be laid before the Legislature in Ontario for approval before becoming effective, or to be subject to a resolution of the Legislature which could disapprove of them after they become effective, the exercise of

subordinate legislative power would be destroyed for practical purposes. Frequently periods of six months or more elapse between sessions of the Legislature. Regulations passed between sessions of the Legislature would either have no effect until affirmed or would be temporarily effective but subject to disapproval. In the former case prompt action under regulations would be impossible, and in the latter case the risks of disapproval would attend any action taken under the regulations (*Report of the Royal Commission—Inquiry into Civil Rights,* February 1968, page 367).

Having given the matter due consideration, **your Committee recommends that normally Parliament should exercise its power of review by a resolution that a questionable regulation be referred to the Government for reconsideration.** We should like to give further consideration to the nature of the amendment to Standing Orders which we would recommend respecting the type of debate on Committee report respecting such a resolution. We should also like to give further consideration to the question of whether there should be some provision in Standing Orders for any group of at least ten members to have the right to require a short debate on a particular regulation provided that this did not interfere with the progress of Government business. The chief attribute of a resolution that a matter be referred to the Government for reconsideration, and to the debate on the motion preceding it, should be its persuasive influence on the Government.

Your Committee also recommends that Parliament should continue to provide, where appropriate in individual statutes, for a procedure by way of affirmative or negative resolution, but we cannot lay down any definitive guidelines as to when it is "appropriate" for Parliament to require such restrictive controls. However, reference might be made to the precedents which may have been established by the ten Canadian provisions quoted in full earlier in this chapter. It may be said, generally, that the more stringent controls should be resorted to when Parliament is enabling subordinate legislation to be made in new areas affecting matters of large consequence to the public. It would appear from most comments on the United Kingdom system that there is no systematic or clear pattern as to the type of controls selected with respect to different types of subordinate legislation. It is of some value to refer to the opinion of a Parliamentary Counsel in the United Kingdom—referred to at page 84 of Dr. Kersell's book, *op. cit,* as follows:

According to the memorandum submitted by Sir Alan Ellis, then First Parliamentary Counsel to the Treasury, to the Select Committee on Delegated Legislation, the question whether the exercise of a particular power of delegated legislation is to be subject to affirmation, negation, or laying without further provision, is answered in the course of preparing the enabling Bill in the same way as other questions of policy, namely, 'on the responsibility of the Minister . . . subject to the ordinary processes of consultation with his colleagues. The level of the Government organization at which the question is decided on any particular Bill varies as in the case of other questions of policy; it can, however, be said that the question is one on which the draftsman regularly receives express instructions from the Department or asks for them if he does not.' Sir Alan went on to state his opinion that it is right there are no express rules for the decision of this question of the type of Parliamentary control to be provided in particular instances. 'Rules for the settlement of questions such as this, which must arise in circumstances of infinite variety, are nothing but an embarrassment tending

to encumber the task of arriving at the right answer in any particular case. The matter is, however, regulated in large measure by precedent.'

It is also of interest to note Dr. Kersell's own assessment of the state of English legislation on this issue. At page 85 he says:

> Contemporary practice, it is reasonably safe to say, is to provide controls according to the following scheme:
>
> For legislative statutory instruments having general effect—
> Affirmative procedure if the instruments,
> 1. alter the effect of the enabling Act,
> 2. make financial provisions,
> 3. put all the 'meat' on a statutory skeleton,
> 4. may prejudice persons or classes of persons or for some other reason are of special importance.
>
> Negative procedure for all the remainder.
>
> For legislative statutory instruments having local effect—
> Affirmative procedure if the instruments,
> 1. put all the 'meat' on a statutory skeleton,
> 2. may prejudice persons or classes of persons, or for some other reason are of special importance.
>
> Negative procedure for virtually all of the remainder.
>
> For administrative instruments having general effect—
> Affirmative procedure if they may prejudice persons or classes of persons or are of special importance for some other reason.
> Negative procedure or 'informative procedure' (requiring laying only) for most of the remainder.
>
> For administrative instruments having local effect—
> 'Informative procedure' in some important cases, but generally there is no laying requirement, the only safeguard being the requirements for publicity.

It would appear difficult to engraft such a complex formula on the Canadian scene, but after a certain amount of experience the new Scrutiny Committee might be able to make recommendations in this area. **Your Committee therefore recommends that the Scrutiny Committee should have the power to report at any time on general matters affecting the law or practice with respect to regulations.**

Your Committee further recommends that it should be reconstituted in the next session to allow further consideration of certain matters referred to in this Report.

Chapter 10

Summary of Recommendations

The following is a summary of your Committee's recommendations:

1. Regulations made in the exercise of the prerogative power of the Governor in Council, insofar as they are of a legislative character, should be subject to the same procedures and requirements as other regulations of a legislative character. (Page 10).
2. Except in the interests of national security, there should be no exemptions from the requirements of the *Regulations Act* other than as to publication. (Page 20).
3. Rules governing practice or procedure in judicial proceedings should not be excluded from the requirements of the *Regulations Act*. (Page 21).
4. The *Regulations Act* should be amended to provide a more inclusive definition of the word "regulation". (Page 27).
5. The Minister of Justice should be charged with the responsibility of deciding for all regulation-making authorities which documents should be classified as regulations. (Page 29).
6. All departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny. (Page 29).
7. All enabling acts for regulation-making authorities should accord with the following principles: (Page 33).
   (*a*) The precise limits of the law-making power which Parliament intends to confer should be defined in clear language. (Page 33).
   (*b*) There should be no power to make regulations having a retrospective effect. (Page 33).
   (*c*) Statutes should not exempt regulations from judicial review. (Page 34).
   (*d*) Regulations made by independent bodies, which do not require governmental approval before they become effective, should be

subject to disallowance by the Governor in Council or a Minister. (Page 34).

(*e*) Only the Governor in Council should be given authority to make regulations having substantial policy implications. (Page 35).

(*f*) There should be no authority to amend statutes by regulation. (Page 37).

(*g*) There should be no authority to impose by regulation anything in the nature of a tax (as distinct from the fixing of the amount of a license fee or the like). Where the power to charge fees to be fixed by regulations is conferred, the purpose for which the fees are to be charged should be clearly expressed. (Page 38).

(*h*) The penalty for breach of a prohibitory regulation should be fixed, or at least limited by the statute authorizing the regulation. (Page 38).

(*i*) The authority to make regulations should not be granted in subjective terms. (Page 39).

(*j*) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations. (Page 40).

8. The Minister of Justice should, where he deems it appropriate, refer the enabling clauses in any Government bill to the proposed Standing Committee on Regulations at the same time as the bill is referred to the relevant Standing Committee for Committee consideration. (Page 42).

9. Before making regulations, regulation-making authorities should engage in the widest feasible consultation, not only with the most directly affected persons, but also with the public at large where this would be relevant. Where a large body of new regulations is contemplated, the Government should consider submitting a White Paper, stating its views as to the substance of the regulations, to the appropriate Standing Committee. When enabling provisions and statutes are being drawn, consideration should be given to providing some type of formalized hearings on consultation procedures where appropriate. (Page 47).

10. The Government should take all necessary steps to facilitate the expansion of the Legislative Section of the Department of Justice and to provide thorough training for legal officers in the Department, including those seconded to other departments, in the drafting of regulations. (Page 52).

11. The present examination of regulations by the Privy Council Office as to form and draftsmanship and by the Department of Justice as to conformity with the *Canadian Bill of Rights* should be continued, and the scrutiny by the Department of Justice should also take into account the other criteria for regulations proposed in this Report. (Page 53).

12. The *Regulations Act* should provide, as a general rule, that a regulation shall not come into force until the date on which it is transmitted to

the Clerk of the Privy Council. In cases of emergency a regulation might come into effect at the time of making. (Page 55, 56).

13. Section 9 of the *Regulations Act*, which allows exemptions from the provisions of that Act, should be amended to provide for exemptions from publication and time of publication only. (Page 58).
14. All regulations, regardless of the regulation-making authority, should be available for public inspection. (Page 59).
15. The statutes should resort more than they do now to the use of provisions stating that the regulations made thereunder, or under specified sections thereof, do not become effective until published on some specified period thereafter. (Page 61).
16. Regulations should be consolidated on a much more regular and frequent basis than has been the practice in the past, and at least once every five years. (Page 63).
17. The present quarterly consolidated index and table of Statutory Orders and Regulations should include reference to all regulations which have been exempted from publication. (Page 63).
18. All regulations should be laid before Parliament forthwith after their transmittal to the Clerk of the Privy Council and their recording and numbering by him. *Votes and Proceedings* should list under "Returns and Reports Deposited with the Clerk of the House" the title of each regulation (which should be as descriptive as possible) the Act under which it is made, its date and the date of its transmittal. (Page 66).
19. A new Committee on Regulations should be established, with the following particulars: (Page 74).
    (1) It should be a Standing Committee of the House of Commons. (Page 74).
    (2) All regulations should stand permanently referred to it. (Page 75).
    (3) It should strive to operate in an objective and non-partisan way. (Page 76).
    (4) It should have a small membership to enable it to operate effectively. (Page 76).
    (5) To make the objectivity of the Committee apparent, there should be some rotation among parties in the chairmanship. (Page 76).
    (6) It should normally sit in public session. (Page 77).
    (7) It should be empowered to sit while Parliament is not sitting. (Page 77).
    (8) It should have adequate staff. (Page 77).
    (9) It should examine regulations on the basis of six criteria: (Page 78).
        (*a*) Whether they are authorized by the terms of the enabling statute. (P. 79).
        (*b*) Whether they appear to make some unusual or unexpected use of the powers conferred by the statute under which it is made. (Page 79).

(*c*) Whether they trespass unduly on personal rights and liberties. (P. 79).

(*d*) Whether they have complied with the provisions of the *Regulations Act* with respect to transmittal, certification, recording, numbering, publication or laying before Parliament. (Page 79).

(*e*) Whether they

(i) represent an abuse of the power to provide that they shall come into force before they are transmitted to the Clerk of the Privy Council or

(ii) unjustifiably fail to provide that they shall not come into force until published or until some later date. (Page 80).

(*f*) Whether for any special reason their form or purport calls for elucidation. (Page 80).

(10) It should have the usual investigative powers of a Standing Committee. (Page 80).

(11) It should have the same power as other Standing Committees to report to the House. (Page 80).

20. The Scrutiny Committee should have the power, in its discretion, to refer regulations to other Standing Committees and that they should then stand referred to such Committees for consideration. (Page 81).

21. Normally Parliament should exercise its power to review by a resolution that a questionable regulation be referred to the Government for reconsideration but Parliament should continue to provide, where appropriate in individual statutes, for a procedure by way of affirmative or negative resolution. (Page 88).

22. The Scrutiny Committee should have the power to report at any time on general matters affecting the law or practice with respect to regulations. (Page 89).

23. Your Committee should be reconstituted in the next session to allow further consideration of certain matters referred to in this Report. (Page 89).

A copy of the relevant Minutes of Proceedings and Evidence (*Issues Nos. 1 to 10 inclusive*) is tabled.

Respectfully submitted,

MARK MACGUIGAN,
Chairman